114-244

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 936.

ASSOCIATION

JOHN V. WEAVER, ARTHUR C. WEAVER, EMILY C. WEAVER, HELEN A. WEAVER, AND ELLA F. WEAVER, WIFE OF GEORGE M. LEWIS, APPELLANTS,

vs.

SPENCER FIELD, SENIOR, SPENCER FIELD, JUNIOR, AND FREDERICK T. FIELD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 15, 1884.

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1 *Bill of Complaint. Filed April* 8, 1881.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

DANIEL WEAVER
versus
SPENCER FIELD *et al.* } No. 9366.

To the honorable the judges of the circuit court of the United States for the eastern district of Louisiana:

Daniel Weaver, of Chicago, and a citizen of the State of Illinois, brings this his bill against Spencer Field, Sr., Spencer Field, Jr., and Frederick T. Field, all of New Orleans, and citizens of the State of Louisiana, residing in said district.

And thereupon your orator complains and says: That he is the holder and owner of the several promissory notes made by
2 Spencer Field (the Senior) to his own order, & by him endorsed, dated November 1st, 1873, and payable, one for two thousand dollars one year after date, one for fifteen hundred dollars two years after date, and one for fifteen hundred dollars three years after date, all bearing interest at the rate of eight per cent. per annum from their respective maturities until paid; that in order to secure the payment of said notes, together with the interest thereon, as well as the fees of the attorney in case of suit thereon, said defendant, Spencer Field (Senior), by an authentic act, passed before W. J. Castell, a notary public in and for the parish of Orleans, State of Louisiana, on said first day of November, 1873, specially mortgaged and hypothecated in favor of James B. Williams, or any holder of said notes, the following-described immovable property, viz:

3 A certain piece or portion of ground, together with all the buildings and improvements thereon, rights, ways, and advantages thereunto belonging or in anywise appertaining, situate, lying, and being in the Faubourg Livandais, in the fourth district of this city (late city of Lafayette, parish of Jefferson), in the square No. 60 of said faubourg, said square being comprised within Washington, Live Oak or Constance, Magazine, and Sixth streets. Said lot is designated by the No. 5 on a plan No. 32 in the book of plans of the late G. R. Stringer, notary, and which lot measures per said plan thirty-one feet eight inches front on Washington street, by one hundred and fifty feet nine inches deep between parallel lines.

That in and by said act said defendant bound and obligated
4 himself not to sell, alienate, or encumber said property to the prejudice of said act of mortgage or that of any holder of said notes secured thereby. All of which will more fully appear by reference to said act; an authentic copy of which is annexed hereto as Exhibit A, and made a part of this bill.

And your orator avers that said act of mortgage was duly recorded

in the office of the office of the recorder of mortgages for the parish of Orleans on the 1st day of November, 1873, in book 99, folio 609.

And your orator further shows that afterwards the said Spencer Field, on the sixth day of June, 1874, by an act passed before said Castell, notary as aforesaid, sold and conveyed unto the defendant,
Spencer Field, Junior (he then and there purchasing the same),
5 all the above-described property, mortgaged as aforesaid; and the said Spencer Field, Junior, in and by said act, expressly assumed the payment of said notes, made by said Spencer Field (Senior), and secured by the aforesaid mortgage; and he also assumed the said mortgage and all the obligations thereof, and of the said Spencer Field (Senior), contained in said act of mortgage, and bound himself not to sell, alienate, or encumber said property to the prejudice of said mortgage. All of which will more fully appear by reference to said act of sale and assumption, an authentic copy of which is hereto annexed as Exhibit B, and made a part of this bill.

And your orator avers that said act, Exhibit B, was duly
6 registered in the conveyance office in the parish of Orleans on the sixth day of June, 1874, in book 129, folio 401, and recorded in the office of the recorder of mortgages for said parish on the 6th day of June, 1874, in book 105, folio 371.

And your orator further shows that afterwards, to wit, on the 31st day of March, 1875, by an act passed before said Castell, notary, the said Spencer Field, Junior, sold and conveyed unto the defendant, Frederick T. Field, the above described immovable property, mortgaged as aforesaid, and which he acquired from said Spencer Field, Sen., as aforesaid; and the said Frederick T. Field, in and by said act, expressly assumed the payment of the notes aforesaid made by said defendant, Spencer Field, Senior, and secured by the aforesaid
mortgage, and he also assumed the said mortgage and all the
7 obligations thereof, and all the obligations of the said Spencer Field, Senior, contained in said act of mortgage, and bound himself not to sell, alienate, or encumber said property to the prejudice of said mortgage. All of which will more fully appear by reference to said act, an authentic copy of which is now hereto annexed as Exhibit C, and made a part hereof.

And your orator avers that said act was duly registered in the office of the register of conveyances for the parish of Orleans on the 31st day of March, 1875, in book 103, folio 668, and recorded in the office of the recorder of mortgages of said parish on the 31st day of March, 1875, in book 138, folio 239.

Your orator shows that in and by said act of mortgage said Spencer Field agreed to pay in the event of suit for the recovery
8 of the amount due upon said notes the fees of the attorneys employed for that purpose, which fees are fixed at five per centum of the amount sued for, and are secured by said mortgage.

Your orator also shows that said Spencer Field in and by said act of mortgage waived and renounced the benefit of appraisement of said property, and expressly agreed that in case of judicial sale thereof under said mortgage that said sale should be without appraisement.

Your orator avers amicable demand for payment of the amount due him in the premises, which defendants refused.

And your orator further shows that heretofore, to wit, on the 5th of February, 1878, he presented his petition to the sixth dis-
9 trict court for the parish of Orleans, and filed the same therein, together with said notes above described, and a copy of said act of mortgage, and prayed executory process thereon, which was granted against the said Spencer Field, and, after due demand for payment, executory process issued from said court, and said property was advertised for sale by the civil sheriff of the parish of Orleans by virtue of said proceedings, the same being entitled Daniel Weaver *vs.* Spencer Field, and numbered 9804 upon the docket of said court; and afterwards the said Spencer Field brought suit in said sixth district court against Daniel Weaver to enjoin said sale under said writ of executory process, and obtained an injunction *pendente lite* suspending proceedings in said suit No. 9804, and said injunction suit still remains undecided. And your ora-
10 tor avers that said Field is without right to enjoin said sale, and that his proceedings are dilatory; that said injunction was obtained without bond, and said defendants are and have been enjoying the revenues of said property during the pendency of said proceedings, and have neglected to pay the taxes thereon.

And your orator avers that said property is insufficient in value to pay the amount due under said mortgage, including taxes & expenses, and that each of said defendants is insolvent, and that a receiver is necessory to administer the property pendingt hese proceedings, so that the revenues thereof may be applied to the payment of the taxes thereon and the reduction of said mortgage debt.

11 Your orator avers that by reason of their assumption of said notes & mortgage the said Spencer Field, Jr., and Frederick T. Field are bound *in solido* with said Spencer Field, Senior, for the amount due your orator in the premises.

In consideration whereof, and inasmuch as your orator has not a complete and adequate remedy at law, to the end, therefore, that the said Spencer Field, Senior, Spencer Field, Jr., and Frederick T. Field may full, true, and perfect answer make to all and singular the premises, (but not under oath, their oaths thereto being waived,) and that they may be decreed *in solido* to pay to your orator the amount of said notes herein mentioned, to wit, the sum of five thousand dollars, with interest at the rate of eight per cent. per annum upon two thousand dollars from the 1st day of November,
12 1874, upon fifteen hundred dollars from the first day of November, 1875, and upon fifteen hundred dollars from the first day of November, 1876, until paid, and the further sum of five per cent. attorneys' fees upon the amount of said notes, principal and interest. And that your orator may be decreed to have a first lien and privilege for the amount so due upon the immoveable property above described and mentioned in Exhibit A from the date of its execution, and that said property may be sold by order of and under the direction of this hon. court, and that out of the moneys arising

from said sale your orator may be paid the full sum decreed to be due him, together with all your orator's costs & charges (in-
13 cluding attorneys' fees) in this behalf sustained, and that if the proceeds of said sale be insufficient to pay the sum due your orator, the said defendants may be decreed *in solido* to pay the same, and that in default thereof your orator may have execution therefor.

And your orator further prays that your honors will forthwith appoint some discreet person receiver in this cause to take charge of said mortgaged property, and collect the rents and revenues thereof during the pendency of these proceedings, the same to be applied to the reduction of the amount due your orator, as the court shall direct.

And may it please your honors to grant unto your orator writs of subpœna, in due form of law, requiring them, and each of them, on a day certain to be named therein, and under a fixed penalty,
14 personally to appear before this honorable court, then and there to answer all and singular the premises, and to stand to, abide by, and perform such order and decree in the premises as may be made against them.

And that your orator may have such other and further relief in the premises as the nature of the circumstances of the case may require, and as to equity and good conscience may seem meet. And your orator will ever pray, etc.

(Signed) J. D. ROUSE,
Solicitor for Compl't.

(Signed) WM. GRANT,
Counsel.

"EXHIBIT A."

Filed with bill April 8th, 1881.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that on this day, before me, William Joseph
15 Castell, a notary public in and for the city of New Orleans, and parish of Orleans, State of Louisiana aforesaid, duly commissioned and sworn, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Mr. Spencer Field of this city, who declared and acknowledged that he is justly and truly indebted unto Mr. James B. Williams, also of this city, in the full and true sum of five thousand dollars, being for money loaned and counted unto him, the receipt whereof he hereby acknowledges, and for the reimbursement whereof he has made and subscribed his three certain promissory notes dated this day, drawn by him to the order of, and by himself endorsed, payable respectively, one at one year after date for the sum of two thousand dollars, and one at two years and one at three
16 years for the sum of fifteen hundred dollars each, and stipulating to bear interest at the rate of eight per centum per annum from maturity until paid.

Now, in order to secure, in capital and eventual interest, the full and final payment of the said three promissory notes (which notes

after having been by me, notary, duly paraphed in order to identify the same herewith) have been delivered unto the said James B. Williams, here present, acknowledging the receipt thereof, and accepting these presents, he, the said Spencer Field, does by these presents specially mortgaged and hypothecate unto the said James B. Williams, and such person or persons who may eventually be the holder or holders of the said three promissory notes, or any
17 one of them, the following described property, to wit, a certain piece or portion of ground together with all the buildings and improvements thereon, and all the rights, ways, and advantages thereunto belonging or in anywise appertaining, situate, lying, and being in the Faubourg Livaudais, in the fourth district (late city of Lafayette, parish of Jefferson) of this city of New Orleans, in the square number sixty of said faubourg, said square being comprised within Washington, Live Oak or Constance, Magazine, and Sixth streets; said lot is designated by the No. five on a plan No. 32 of the book of plans of the late G. R. Stringer, notary, and which lot measures, per said plan, thirty-one feet eight inches front on Washington street by one hundred and fifty feet nine inches deep,
18 between parallel lines, being the same property which said mortgager acquired by purchase from Adam Graner, per act passed before James Graham, a notary public in this city, under date of the twenty-seventh day of August, eighteen hundred & sixty-two. The said property and premises so to remain mortgaged and hypothecated until the full and final payment of the aforesaid promissory notes in capital & interest; the said mortgager hereby binding himself and his heirs not to sell, alienate, nor encumber the same to the prejudice of these presents.

And the said mortgager further declared that he does by these presents bind and obligate himself to cause all and singular the buildings and improvements on the property afore described,
19 to be insured and kept insured against the risk of fire by one of the insurance companies offices in this city, to their full value, until the full and final payment of said afore described promissory notes, and to transfer and deliver unto the said mortgagee the policy or policies of such insurance or insurances, in default whereof said mortgagee, and any and all holders of said promissory notes, is, and are hereby, authorized to cause such insurance or insurances to be made and effected at the cost, charge, and expense of said mortgager.

And the said mortgager further declared that he does by these presents consent, agree, and stipulate that in the event of the said promissory notes not being punctually paid at their respective maturities, it shall be lawful for, and he does hereby authorize, the said
20 mortgagee or any other holder or holders thereof, to cause all and singular the property herinbefore described and herein mortgaged, to be seized and sold under executory process (issued by any competent court), without appraisement, to the highest bidder, payable cash; the said mortgager hereby expressly dispensing with all and every appraisement thereof, and, by these presents, waiving and renouncing the benefit of appraisement and of laws or parts

of laws relative to the appraisement of movable or immovable effects, etc., seized and sold under executory or other legal processs, the said mortgager hereby confessing judgment in favor of said mortgagee, and such person or persons who may be the holder or holders of said promissory notes for the full amount thereof, capital
21 and interest, and together with all costs, charges, and expenses whatsoever.

And the said mortgager further declared that he does by these presents bind and obligate himself and his heirs to pay and reimburse unto said mortgagee and such person or persons who may be holder or holders of said promissory notes, all such lawyers' or attorneys' fees, together with all such costs, charges, and expenses as said mortgagee or any such holder or holders shall or may incur or pay in the event of the non-payment of said promissory notes at maturity; said attorneys' fees, however, to be fixed at five per cent. on the amount sued for.

Now, to secure the faithful performance of the foregoing obligation and the reimbursement and payment of the said lawyers'
22 or attorneys' fees, costs, charges, and expenses aforesaid, and the reimbursement and payment of all premium or premiums as shall be paid by the said mortgagee or any holder or holders of the aforesaid promissory notes, in causing insurance to be effected, in default of said mortgager as aforesaid, he, the said mortgager, does by these presents further specially mortgage and hypothecate the hereinbefore-described property unto and in favor of said mortgagee and all holders of said promissory note. According to the annexed certificate of the recorder of mortgages in and for this city & parish, dated this day, it appears that there are no other mortgages standing in the name of said mortgager and recorded against the property hereinbefore described than the
23 draining privilege, the privilege in favor of this city for taxes of 1871 against S. Field, amounting to $55, int., costs, &c., on other property, and to $192.50, int., costs, &c., against Spencer Field & Walter Bell, bearing also on other property than the one above described, & the general mortgage in favor of A. Marchand resulting from a judgment rendered by the 5th district court on 25th March, 1873, for the sum of $700, int., costs, &c., as stipulated in said judgment, against said Spencer Field.

And whereupon personally came and appeared and intervened to this act, Mistress Clara Humphreys, of lawful age, and wife of said Spencer Field, who being herein duly authorized and assisted by her said husband, took cognizance of the foregoing act of
24 mortgage which I, notary, carefully read and explained to her, and having so done, she declared that it was her intention not only to ratify said mortgage, but to make renunciation of all rights she has by mortgage or otherwise on the said property, upon which I, notary, declared to her separately and apart from her husband and out of his presence, as it is my duty, that by the laws of this State she possessed a general mortgage on all the property of her said husband and upon that of the community in case she should renounce thereto—

First. For the restitution of her dowry and the reinvestment of dotal property brought by her in marriage.

Second. For the restitution of dotal property, by her acquired during marriage, by inheritance, donation, or otherwise.

25 Third. For indemnity against all debts contracted, or which she may hereafter contract, with her said husband.

Fourth. For such of her paraphernal property and funds as may have been alienated by her said husband, or of which he has had, or may have, the administration or enjoyment, or of which he may otherwise have benefited.

Fifth. For nuptial presents made to her by her said husband or others; that in making her intended renunciation she would deprive herself irrevocably and forever of all rights of reclamation against said property, whether under mortgage, privilege, or otherwise.

Whereupon the said wife declared that she still persisted in the intentions she had announced to ratify said act of mortgage

26 and to dispossess herself of all rights and liens which she has upon said property, whether by marriage, contract, dower, donation, or otherwise; and said husband being now again present before me, and authorizing his said wife, she again declared that she does hereby formerly renounce, henceforth and forever, all and singular her said rights, and transfers the same to the said mortgagee, his heirs and assigns, to be had and held by him and them, and by them enjoyed in law and thereout; and she hereby binds herself and her heirs to the said mortgagee, his heirs and assigns, that she and they shall and will at all times acknowledge the validity of

27 the present mortgage and of the renunciation she now makes of all rights which he has or may have in and to the said property, and that neither she nor they shall ever seek to oppose or impair the force of this act, hereby renouncing the benefit of all laws, privileges, and customs of which she might avail hereself, or which are in her favor in the premises.

Done and passed at New Orleans, the first day of November, eighteen hundred and seventy-three, in presence of James J. Woulfe and Harris Murphy, witnesses, residing in this city, who have signed their names with the said appearers, and me, notary, after reading thereof.

Original signed SPENCER FIELD.
" CLARA H. FIELD.
" J. B. WILLIAMS.
" W. J. CASTELL, *Not. Pub.*
" JAMES J. WOULFE.
" HARRIS MURPHY.

I certify the above and foregoing to be a true copy of the original act extant in my current register.

28 In faith whereof I grant these presents under my signature and the impress of my seal of office.

New Orleans, April 7th, 1881.

[SEAL.] (Signed) W. J. CASTELL,
Not. Pub.

"EXHIBIT B."

Filed with Bill, April 8, 1881.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Be it known that on this sixth day of June, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-eighth, before me, William Joseph Castell, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified
29 and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Mr. Spencer Field, of this city, who declared that for the price and sum and on the terms and conditions hereinafter expressed he does by these presents, grant, bargain, sell, convey, transfer, assign, and set over, with a full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other incumbrances whatsoever, unto Mr. Spencer Field, Jr., also of this city, present, accepting and purchasing for himself, his heirs and assigns, and acknowledging delivery and possession thereof—

A certain piece or portion of ground, together with all the buildings and improvements thereon, rights, ways, and advan-
30 tages thereunto belonging or in anywise appertaining, situate, lying, and being in the Faubourg Livandais, in the fourth district of this city (late city of LaFayette, parish of Jefferson), in the square number sixty of said faubourg, said square being comprised within Washington, Live Oak or Constance, Magazine, and Sixth streets. Said lot is designated by the number five, on a plan No. 32, in the book of plans of the late G. R. Stringer, notary, and which lot measures per said plan thirty-one feet eight inches front on Washington street by one hundred and fifty feet nine inches deep, between parallel lines.:

Being the same property which the present vendor acquired
31 by purchase from Adam Graner by an act passed before James Graham, a notary public in this city, under date of the twenty-seventh day of August, eighteen hundred and sixty-two, & he does not appear to have alienated said property since he acquired the same, as appears by reference to the annexed certificate from the recorder of conveyances in & for this city & parish, dated 4th June, 1874, & by reference to the annexed certificate from the recorder of mortgages in & for this city and parish, dated 4th instant, there appears to be no other mortgages standing in the name of said vendor & recorded against the property herein conveyed than the draining privilege; the mortgage he granted in favor of J. B. Williams, by act before me, notary, dated 1st Nov., 1873, to secure $5,000, int. & costs, the payment of which is hereinafter
32 assumed by the present purchaser; the general one in favor of the city for taxes 1871, for $247.50, int., costs, &c., on other property of S. Field & W. O. Bell; the general one in favor of Alfred Marchand, resulting from a judgment by 5th dist. court on 25th

March, 1873, for $700, int., costs, &c., against Spencer Field, & the general one in favor of Ed. Thompson, resulting from a judgment by the 6th dist. court on 28th April, 1874, for $3,354.43, int., costs, &c., against the same.

To have and to hold the said property and appurtenances unto the said purchaser, his heirs and assigns, forever; and the said vendor the said property & appurtenances herein conveyed to the said purchaser, his heirs and assigns, shall and will warrant and forever defend against all legal claims and demands
33 whatsoever; and the said vendor moreover transfers unto the said purchaser all and singular the rights and actions of warranting to which he is or may be entitled against any and all of the former owners of the said property herein conveyed, hereby subrogating the said purchaser in and to the said rights and actions, to be by him enjoyed and exercised in the same manner as they might have been by the said vendor himself.

This sale is made and accepted for and in consideration of the price and sum of five thousand one hundred dollars ($5,100), in part payment and deduction whereof said purchaser has 1st presently paid in ready current money unto said vendor the sum of one hundred dollars, the receipt whereof he hereby acknowledges and
34 grants acquittance therefor ---------- $100 00

2nd. And for the balance said purchaser puts himself in the place & stead of said vendor, hereby assumes and binds himself to pay to the acquittance of said vendor the afore-recited mortgage of five thousand dollars, being the amount of three certain promissory notes drawn by said vendor, to the order of and by himself endorsed, dated 1st November, 1873, payable respectively one at one year after date, for the sum of two thousand dollars; one at two years, & one at three years after date, for the sum of fifteen hundred dollars each, bearing eventual interest at the rate of eight per cent. per annum from maturity until paid, & paraphed *Ne varietur* by the undersigned, notary, to identify them with said—

Amount forwarded ----------	$100 00
35 Amount forwarded ----------	$100 00

act of 1st November, 1873, passed in this office, said purchaser obligating himself hereby to take up & pay to the acquittance of said vendor the said three notes at their respective maturities; & further assuming all the mortgage obligations taken by said vendor in said act, & binding himself & his heirs not to sell, alienate, or encumber said property to the prejudice of the mortgage, the payment of which he has herein assumed ---------- $5,000 00

Total ----------	$5,100 00

The production of the tax receipts showing what taxes may be due

or owing on said property is herein dispensed with by consent of said parties, who hereby bind themselves to exonerate me, notary, against all responsibility in the premises by reason of the non-
36 production of said documents.

And now to these presents personally came and appeared Madam Clara Humphrey, of lawful age, and wife of said Spencer Field, who, after having taken cognizance of the foregoing act, which I, the said notary, carefully read and explained to her, declared and said she approves and ratifies the same, and that it is her wish and intention to release in favor of the said purchaser the property herein described from the matrimonial, dotal, paraphernal, and other rights, and from any claims, mortgages, or privileges to which she may be entitled, whether by virtue of her marriage with her said husband or otherwise.

Whereupon I, the said notary, did inform the said Madam Field, apart and out of the presence and hearing of her husband, that by
37 the laws of this State the wife has a legal mortgage on the property of her husband, first, for the restitution of her dowry, and for the reinvestment of the dotal property sold by her husband, and which she brought in marriage, reckoning from the celebration of the marriage; secondly, for the restriction and reinvestment of the dotal property by her acquired since marriage, whether by succession or donation, from the day the succession was opened or the donation perfected; thirdly, for nuptial presents; fourthly, for debts by her contracted with her husband; and fifthly, for the amount of her paraphernal property alienated by her and received by her husband, or otherwise disposed of for his individual interest. That in making her intended renunciation she would deprive herself irre-
38 vocably and forever of all rights of reclamation against the property herein described, whether under mortgage privilege or otherwise.

And the said Madam Field did thereupon declare unto me, notary, that she was fully aware of and acquainted with the nature and extent of the matrimonial, dotal, paraphernal, and other rights and privileges thus secured to her by law on the property of her said husband; and that she nevertheless did persist in her intention of renouncing, and does formally renounce, not only all the rights, claims, and privileges hereinbefore enumerated and described, but all others of any nature or kind whatever to which she is or may be entitled by any laws now or heretofore in force in the State of Louisiana.

And the said Spencer Field, being now present, aiding and
39 authorizing the said Madam Field in the execution of these presents, she, the said Madam Field, did again declare that she did and does hereby make a formal renunciation and relinquishment of all her said matrimonial, dotal, paraphernal, and other rights, claims, and privileges in favor of the said purchaser, binding herself and her heirs at all times to sustain and acknowledge the validity of this renunciation.

Thus done and passed in my office, at New Orleans aforesaid, the day, month, and year first above written, in the presence of James J.

Woulfe and Harris Murphy, witnesses of lawful age, domiciliated in this city, who hereunto sign their names with the parties,
40 and me, the said notary, after the reading of these presents.

Original signed. SPENCER FIELD.
" " CLARA H. FIELD.
" " SPENCER FIELD, JR.

JAMES J. WOULFE.
HARRIS MURPHY.

W. J. CASTELL,
Not. Pub.

I certify the above and foregoing to be a true copy of the original act, extant in my current register.

In faith whereof I grant these presents under my signature and the impress of my seal of office.

New Orleans, May 24, 1879.

[SEAL.] (Signed) W. J. CASTELL,
Not. Pub.

"EXHIBIT C."

Filed with Bill, April 8, 1881.

STATE OF LOUISIANA, *Parish of Orleans, City of New Orleans:*

Be it known, that on this thirty-first day of March, in the
41 year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the ninety-ninth, before me, William Joseph Castell, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Mr. Spencer Field, Junior, of this city, who declared that for the price and sum and on the terms and conditions hereinafter expressed, he does by these presents grant, bargain, sell, convey, transfer, assign, and set over with a full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other incumbrances whatsoever unto Mr. Frederick Thayer Field, also of this
42 city, present, accepting, and purchasing for himself, his heirs and assigns, and acknowledging delivery and possession thereof:

A certain piece or portion of ground, together with all the buildings and improvements thereon, rights, ways, and advantages thereunto belonging or in anywise appertaining, situate, lying, and being in the Faubourg Livandais, in the fourth district of this city (late city of Lafayette, parish of Jefferson, in this State), in square number sixty of said faubourg, said square being comprised within Washington Constance (formerly Live Oak), Magazine, and Sixth streets; said lot is designated by the number five on a plan No. 32 in the book of plans of the late G. R. Stringer, notary, and which lot
43 measures per said plan, thirty-one feet eight inches front on Washington street by one hundred and fifty feet nine inches deep, between parallel lines.

Being the same property which the present vendor acquired by purchase from Spencer Field as per act passed before the undersigned notary, under date of the sixth day of June, eighteen hundred and seventy-four, and he does not appear to have alienated said property since he acquired the same, as will appear by reference to the certificate from the register of conveyances in and for this city and parish, dated 30th March inst., & annexed to another act of sale from the present vendor to the present purchaser, passed in this office under date of this day.

By reference to the certificate from the recorder of mortgages
44 in and for this city & parish, dated 27th March, 1875, & annexed to said other act, there appears to be no other mortgages standing in the name of said vendor & recorded against the property herein conveyed than the draining privilege; the reversion he took by his act of purchase above mentioned up to $5,000, int. & costs, of the mortgage granted by S. Field, Sen'r, in favor of Jas. B. Williams, per ac't, before me, notary, dated 1st Nov'r, 1873, to secure the payment of $5,000, int. & costs, which is hereinafter assumed by the present purchaser, and said property is subject to the general mortgage in favor of Ed. Thompson, resulting from a judgment rendered by the 6th dist. court on the 28 April, 1874, against S. Field, Sr., for $3,354.43, with int. & costs stipulated in said
45 judgment, and the following taxes against S. Field, Jr., the city taxes for 1874—$100 judg't by superior district court for same amount for said taxes in favor of said city.

To have and to hold the said property and appurtenances unto the said purchaser, his heirs and assigns, forever. And the said vendor the said property and appurtenances herein conveyed to the said purchaser, his heirs and assigns, shall and will warrant and forever defend against all legal claims and demands whatsoever. And the said vendor, moreover, transfers unto the said purchaser all and singular the rights and actions of warranty to which he is or may be entitled against any and all of the former owners of the said property herein conveyed; hereby
46 subrogating the said purchaser in and to the said rights and actions, to be by him enjoyed and exercised in the same manner as they might have been by the said vendor himself.

This sale is made and accepted for and in consideration of the price and sum of five thousand one hundred dollars ($5,100), in part payment and deduction whereof said purchaser has, 1st, presently paid in ready current money unto said vendor the sum of one hundred dollars, the receipt whereof he hereby acknowledges and grants acquittance therefor ---------- $100 00

2d. And for the balance of said purchase price said purchaser puts himself in the place & stead of said vendor; hereby assumes & binds himself to pay to the acquittance of said vendor & of said S. Field the aforerecited mortgage of—

Amount forwarded ---------- $100 00

47 Amount forwarded $100 00

five thousand dollars, being the amount of three certain promissory notes drawn by said Spencer Field to the order of & by himself endorsed, dated 1st Nov., 1873, payable, respectively, one at one year after date, for the sum of two thousand dollars; one at two years & one at three years after date, for the sum of fifteen hundred dollars each, bearing eventual interest at the rate of eight per cent. per annum from maturity until paid & paraphed *ne varietur* by the undersigned notary to identify them with said act of 1st Nov'r, 1873, passed in this office; which mortgage was assumed by the present vendor in his own act of purchase of the 6th June, 1874, aforesaid; the present purchaser hereby obligating himself to take up and pay to the requittance of said vendor & of S. Field said three notes when due & exigible, & further assuming all the mortgage obligations taken by said S. Field in said act of 1st Nov.,—

Amount forwarded $100 00

48 Amount forwarded $100 00

1873, & assumed by the present vendor in said act of 6th June, 1874, & binding himself & his heirs not to sell, alienate, or encumber said property to the prejudice of the mortgage, the payment of which he has herein assumed 5,000 00

Total $5,100 00

The production of the tax receipts, showing what taxes may be due or owing on said property, is herein dispensed with by consent of parties hereto, who hereby bind themselves *in solido* to warrant, defend, and indemnify me, notary, against all responsibility in the premises by reason of the non-production of said documents.

And now to these presents personally came and appeared Madam Mollie A. Farrell, of lawful age and wife of said Spencer Field, Jr., who, after having taken cognizance of the foregoing act, which
49 I, the said notary, carefully read and explained to her, declared and said she approves and ratifies the same, and that it is her wish and intention to release in favor of the said purchaser the property herein described from the matrimonial, dotal, paraphernal, and other rights, and from any claims, mortgages, or privileges to which she may be entitled, whether by virtue of her marriage with her said husband or otherwise.

Whereupon I, the said notary, did inform the said Madam Field, apart and out of the presence and hearing of —— husband, that by the laws of this State the wife has a legal mortgage on the property of her husband: First, for the restitution of her dowry, and for the reinvestment of the dotal property sold by her husband, and

which she brought in marriage, reckoning from the celebration of the marriage; secondly, for the restriction and re-investment of the dotal property by her acquired since marriage, whether by succession or donation, from the day the succession was opened or the donation perfected; thirdly, for nuptial presents; fourthly, for debts by her contracted with her husband; and, fifthly, for the amount of her paraphernal property alienated by her, and received by her husband, or otherwise disposed of, for his individual interest; that in making her intended renunciation she would deprive herself irrevocably and forever of all rights of reclamation against the property herein described, whether under mortgage, privilege, or otherwise; and the said Madam Field did thereupon declare unto me, notary, that she was fully aware of and acquainted with the nature and extent of the matrimonial, dotal, paraphernal, and other rights and privileges thus secured to her by law on the property of her said husband, and that she nevertheless did persist in her intention of renouncing, and does formally renounce, not only all the rights, claims, and privileges hereinbefore enumerated and described, but all others of any nature or kind whatever to which she is or may be entitled by any laws now or heretofore in force in the State of Louisiana.

And the said Spencer Field, Jr., being now present, aiding and authorizing the said Madam Field in the execution of these presents, she, the said Madam Field, did again declare that she did and does hereby make a formal renunciation and relinquishment of all her said matrimonial, dotal, paraphernal, and other rights, claims, and privileges in favor of the said purchaser, binding herself and her heirs at all times to sustain and acknowledge the validity of this renunciation.

Thus done and passed in my office at New Orleans aforesaid, the day, month, and year first above written, in the presence of James J. Woulfe and Harris Murphy, witnesses of lawful age, domiciliated in this city, who hereunto sign their names with the parties and me, the said notary, after the reading of these presents.

(Original signed) SPENCER FIELD, JR.
" " MOLLIE A. FIELD.
" " FREDERICK T. FIELD.
" " HARRIS MURPHY.
" " JAMES J. WOULFE.

W. J. CASTELL, *Not. Pub.*

I certify the above and foregoing to be a true copy of the original act extant in my current register.

In faith whereof I grant these presents under my sigature & the impress of my seal of office.

New Orleans, April 7th, 1881.

[SEAL.] (Signed) W. J. CASTELL, *Not. Pub.*

53 *Plea. Filed June 6th*, 1881.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

DANIEL WEAVER *vs.* SPENCER FIELD *et als.*

These defendants, Spencer Field, Spencer Field, Jr., and Frederick T. Field, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill of complaint mentioned and contained to be true in such sort, manner, and form as the same are therein set forth and alleged, for plea to the whole of said bill, say:

1. That on February —, 1878, Daniel Weaver, complainant in this cause, representing himself as a resident in New Orleans, filed a petition in the six- district court for the parish Orleans against Spencer Field, one of these defendants, based upon the same notes and
54 mortgage as those referred to and made part of his bill of complaint herein as Exhibit A, and on the same day obtained an order from said court for on order of seizure and sale of the property described in the act of mortgage, directing the civil sheriff of the parish of Orleans to seize and sell said — for cash to pay the said notes in principal, interest, and attorneys' fees; that shortly after said writ was issued the said shereiff did seize, advertise, & was about to sell said property, when one of these defendants, Spencer Field, filed a petition in the same court on representing, in substance, that the three notes referred to in complainant's bill were his property; that he has placed in the hands of complainants as a deposit, long after they were made, asking that they be surrendered and
55 delivered up to him cancelled, together with the mortgage given to secure their payments, and praying for a writ of injuncting to restrain & prevent the sale of the property given to secure their payment; that a writ of injunction was issued on said petition, and the complainant and civil sheriff *injoined* from selling said property; all of which will more fully appear from the record in said suit, entitled Spencer Filed *vs.* Daniel Weaver *et als.*, annexed and made part hereof as Exhibit A.

2nd. That said two suits are still pending in the sixth district court, now the civil district court, for the parish of Orleans.

3. That said civil district court for the parish of Orleans, being first seized of jurisdiction in said two suits, retains it to the exclusion of this honorable court.

56 4. That the notes and mortgage referred to in complainant's bill therein belong to the record of the suit first described herein, and the proceedings in said suit have been enjoined by a writ issued from a court of competent jurisdiction, to wit, the late sixth district court for the parish of Orleans, and complainant has no right to defeat the jurisdiction of said court by withdrawing any portion of the record or proceeding to do a thing which he has been enjoined & prohibited from doing by said sixth district court.

5. That the court first seized of jurisdiction of the subject-matter

of a suit, whether State or Federal, retains said jurisdiction to the exclusion of all others.

See Taylor *vs.* Carryl, 20th Howard, p. 583.
Freeman *vs.* How, 24 Howard.
Hogan *vs.* Lucas, 10 Peters, p. 172.

57 6. That the property described in the bill of complaint herein is now in possession of the civil sheriff for the parish of Orleans, under a writ of seizure and sale issued from the late sixth district court for the parish of Orleans in the suit of Daniel Weaver *vs.* Spencer Field, No. — of the docket of said court, and that the further proceedings in said suit have been enjoined in the suit of Spencer Field *vs.* Daniel Weaver, No. — of the docket of said court; that said two suits are still pending and undecided, and these defendants plead the same in bar of this suit.

Therefore these defendants doth plead the several facts referred above in bar to complainant's bill herein, and pray the judgment of this honorable court whether they should be compelled to
58 make any further answer to said bill, and pray to be hence dismissed, with their reasonable costs & charges in that behalf most wrongfully sustained.

(Signed) BENTINCK EGAN,
Solicitor for Defendants.

I certify that, in my opinion, the foregoing pleas in bar of the defendants, Spencer Field, Spencer Field, Jr., and Frederick T. Field, to the bill of complaint are well founded in law & proper to be filed in the above cause.

BENTINCK EGAN,
Solicitor, of Counsel.

Spencer Field, Spencer Field, Jr., Frederick T. Field, being duly sworn, say: That they have read the foregoing pleas to the bill of complaint in this suit; that the same are not interposed for the purpose of delaying said suit or any proceeding therein, and is true in point of fact.

(Signed) SPENCER FIELD.
" SPENCER FIELD, JR.
" FRED. T. FIELD.

Subscribed and sworn before me, June 6, 1881.
(Signed) T. V. COUPLAND,
59 *Commissioner United States Circuit Court,*
Eastern District of Louisiana.

Endorsement:

The complainant by Rouse & Grant, his solicitors, sets down the within plea for argument July 4, '81.

(Signed) ROUSE & GRANT,
Solicitors.

Bill of Revivor. Filed November 18th, 1881.

U. S. Circuit Court, Eastern district of Louisiana.

DANIEL WEAVER
vs.
SPENCER FIELD *et al.* } No. 9366.

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

John V. Weaver and Arthur C. Weaver, citizens of the State of Illinois, residing in said State, and Emily C. Weaver, spinister; Helen O. Weaver, spinister, and Ella F. Weaver, wife of George M. Lewis, herein assisted and joined by her said husband for the
60 purpose of authorizing her herein, citizens and residents of the State of New York, bring this, their bill of revivor, against Spencer Field, Senior; Spencer Field, Junior, and Frederick T. Field, all citizens of the State of Louisiana, residing in said eastern district of Louisiana.

And thereupon your orators complain and say, that on or about the eighth day of April, 1881, the said Daniel Weaver filed in this honorable court, under the above title and number, his bill against the said defendants, Spencer Field, Senior, Spencer Field, Junior, and Frederick T. Field, setting forth the execution by said defendant, Spencer Field, Senior, of three certain promissory notes, drawn by him to his own order and by him endorsed, dated November 1st, 1873, and payable, one for two thousand dollars one year after date, one for fifteen hundred dollars two years after date,
61 and one for fifteen hundred dollars three years after date, all bearing interest at the rate of eight per cent. per annum, from their respective maturities until paid, and further stating that said notes, in principal and interest, together with five per cent. attorneys' fees upon the aggregate amount of said principal and interest, were secured by mortgage upon certain real estate described in said bill, said act of mortgage having been passed before W. J. Castell, notary public of parish of Orleans, on said first day of November, 1873; and further stating that said defendants, Spencer J. Field, Junior, and Frederick T. Field had, subsequently to the execution of said notes and mortgage, assumed the payment of said notes and said mortgage, and further stating that said defendants had failed
62 and refused to pay said notes and comply with the conditions of said mortgage, and thereupon praying for decree against defendants *in solido* for the sum of five thousand dollars, with eight per cent. per annum interest on $2,000 from November 1st, 1874, upon $1,500 from 1st day of November, 1875, and upon $1,500 from November 1st, 1876, until paid, and the further sum of five per cent. attorneys' fees upon the amount of said principal and interest; and further praying for the recognition of his said mortgage as a first lien and privilege upon the said real estate for the amount so due; and that the said real estate be ordered to be sold, and that he be paid, out of the moneys arising from said sale, the full sum decreed to be due him, including his costs and charges, and that in

the event of the said proceeds of sale being insufficient to
63 pay the said sum decreed to be due that he have execution against said defendants for the balance remaining due; and also praying for the appointment of a receiver to take charge of said real estate during the pendency of said bill on file in this court will on reference appear.

And your orators further show that the said defendants were duly served with process, and appeared to the said original bill of Daniel Weaver, and put in their plea thereto; that the said plea was set down by the said complainant, Daniel Weaver, and that the said plea is still pending and undecided.

And your orators further show that on or about the 23d day of July, 1881, the said complainant, Daniel Weaver, departed this life, leaving as his sole heirs and universal legatees your orators;
64 that your orators have been recognized by the civil district court for the parish of Orleans as the said sole heirs and legatees of said late Daniel, and have been put in possession of all the property and effects, real, personal, and mixed, of the said Daniel Weaver by judgment rendered by said civil district court in certain proceedings had in the succession of said Daniel Weaver, on the 21st day of September, 1881.

And your orators further show unto your honors that the said suit having become abated by the death of the said late complainant, Daniel Weaver, your orators, as the said heirs and legatees of the said Daniel Weaver in possession of his estate under said judgment of the civil district court of the parish of Orleans, are,
65 as they have been advised, entitled to have the said suit revived against the said defendants, and to have the same prosecuted and carried into full effect against them, in like manner as the said Daniel Weaver could or might have had if he had not died.

To the end, therefore, that the said Spencer Field, Senior, Spencer Field, Junior, and Frederick T. Field may show cause, if they can, why the said suit and proceedings therein should not stand and be revived against them, and in favor of your orators as such heirs, legatees, and representatives of said late complainant, Daniel Weaver, as aforesaid, and be in the same plight and condition as the same were in at the time of the abatement thereof, and that the said suit and proceedings had therein may stand and be revived accordingly, may it please your honors to grant unto your
66 orators writs of subpœna to revive the same, issuing out of and under the seal of this honorable court, to be directed to the said defendants, Spencer Field, Senior, Spencer Field, Junior, and Frederick F. Field, thereby commanding them and each of them by a certain day and under a certain penalty therein expressed, personally to be and appear before your honors, in this honorable court, and then and there to show cause, if they can, why the said suit and the proceedings therein had should not stand and be revived against them, and in favor of your orators, and be in the same plight and condition as the same were at the abatement thereof; and further, to stand to stand to and abide such order and decree in

the premises as to your honors may seem meet; and your orators will ever pray, etc.

(Signed) ROUSE & GRANT,
Sol's for Complainants.

67 *Order Reviving Suit. Filed February* 27, 1882.

United States Circuit Court, Eastern Dist. of Louisiana.

DANIEL WEAVER
vs. } No. 9366.
SPENCER FIELD *et al.*

On motion of Rouse & Grant, and showing that subpœna on the bill of revivor, filed herein on Nov. 18, 1881, was served on each of the defendants herein more than fourteen days prior to the 1st rule day in January, 1882, and that no cause has been shown against the revivor prayed for in said supplemental bill of revivor—

It is now ordered that this cause do stand revived in the name of John V. Weaver, Arthur C. Weaver, Helen O. Weaver, and Ella F. Weaver, wife of George M. Lewis, heirs of the said Daniel Weaver, deceased, and that it be prosecuted in their name and be and
68 stand in the same plight as it was at the date of his death.

Hearing and Submission of Plea. Extract from the Minutes. November Term, 1881.

NEW ORLEANS, SATURDAY, *April 15th*, 1882.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

DANIEL WEAVER
vs. } No. 9366.
SPENCER FIELD *et als.*

This cause came on to be heard on the demurrer to the plea of defendant, and was argued by the counsel for the respective parties, and submitted, when the court took time to consider.

Order. Plea Insufficient and Time Allowed to Answer, &c. Extract from the Minutes of April 19th, 1882.

DANIEL WEAVER
vs. } No. 9366.
SPENCER FIELD *et als.*

This cause came on to be heard on the demurrer to the plea of the defendant, and was argued by counsel. On consideration
69 whereof the plea is adjudged insufficient, and defendant is allowed till next rule day to answer.

"*Answer.*" *Filed June 2d*, 1882.

U. S. Circuit Court, Eastern District of Louisiana.

DANIEL WEAVER'S HEIRS AND LEGATEES
vs.
SPENCER FIELD and others. } No. 9366.

Now come Spencer Field, Spencer Field, Jr., and Frederick T. Field, all citizens of the State of Louisiana, against whom Daniel Weaver exhibited his bill of complaint herein, which hath been revived in the names of certain persons styling themselves heirs and universal legatees of said Weaver, and protesting that this cause is not cognizable in a court of equity, and that this honorable court is without jurisdiction to entertain and to hear
70 and determine the same for causes and reasons apparent on the face of the said bill of complaint; nevertheless for answer to the said bill, or to so much thereof as they are advised it is material for them to answer, respondents respectfully plead and show that they deny all and singular the statements and allegations in the said bill contained except such as are hereinafter admitted to be true.

Further answering, respondents admit—

1st. That Spencer Field made and executed the three promissory notes, and the mortgage in the said bill referred to as Exhibit A; that said notes and mortgage are dated 1 November, 1873; that the said mortgage contains the clause commonly called and known as the "*pact de non alienando*," and that the said mortgage was recorded in the mortgage office.

71 2d. That Spencer Field, on the 6 June, 1874, sold and conveyed to Spencer Field, Jr., the property so mortgaged; that Spencer Field, Jr., assumed the said mortgage of 1 Nov'r, 1873, and that the said act of sale and conveyance of 6 June, 1874, was registered in the conveyance office, and recorded in the mortgage office.

3d. That Spencer Field, Jr., on the 31 March, 1875, sold and conveyed the said property to Frederick T. Field. That Frederick T. Field assumed the afore-mentioned mortgage of 1 Nov., 1873; and that the said act of sale and conveyance of 31 March, 1875, was registered in the conveyance office, and recorded in the mortgage office.

4th. That the allegations in the said bill with respect to the suit, by executory process, in the sixth district court, No. 9804 of the docket, are substantially correct so far as they go; but that it
72 is not stated in said bill, as the truth is, that the sheriff seized the mortgaged property and took it into his possession before he advertised it for sale.

Further answering, respondents plead and show that the order granting executory process in the said suit No. 9804, as in all such cases, is a judgment *in rem*, condemning the mortgaged property to be seized and sold in satisfaction of the mortgage debt. That the writ of seizure and sale upon the said order and judgment was issued and was placed in the hands of the civil sheriff of the parish

of Orleans, the proper officer, on the 13 day of February, 1878; that the said sheriff immediately, on the same day, seized the mortgaged property; that he caused three notices of seizure to be made,
73 each and all of which were dated 13 February, 1878, and contained the title of the suit, the number upon the docket, the name of the court from which the writ issued, the amount of the claim specified in the writ, and an exact copy of the description of the property seized, and of the metes and bounds, as given in the said writ and in the act of mortgage.

That the said sheriff, on the same day, filed one of the said notices in the office of the recorder of mortgages in and for the parish of Orleans, and on the same day, the 13 of February, 1878, the said notice was recorded in the said office, in book 156, folio 400, as will appear by the copy of said notice, and the certificate of the recorder of mortgages attached to the same, marked No. 1, herewith filed as part of this answer, and for greater certainty of averment.

74 That the said sheriff served one of the said notices on Spencer Field, the only defendant in said suit, on the 14 day of February, 1878, and he kept and retained the remaining notice.

That the said sheriff also caused the proper entry to be made in the "Seizure Book" kept in his office for that purpose, which entry gives an exact description of the property seized, as the same is given in the writ and in the said notices of seizure.

That said sheriff did also, on the 14th Feb'y, 1878, under the said writ, seize the rents due and to become due on the said property in the hands of the tenants occupying the same.

That the said writ of seisure and sale has not been returned into court, and it cannot be returned, nor can the sheriff part
75 with the custody of the said writ until it has been satisfied; that is, until it has been either executed or has ceased to be in force by the dismissing or discontinuance of the proceedings. That Thomas H. Handy was civil sheriff at the time the said writ issued, and the seizure was made under it. That when his term of office expired the said writ went into the hands and custody of his successor, Gauthreaux; that on the 2 Jan'y, 1879, the said sheriff gave notice to the tenants in possession of the said property to pay the rents to him and the collected rents on the mortgaged property under the said writ. That when the term of office of said Gauthreaux expired the said writ went into the hands and custody of his successor in office, Duffy, the present civil sheriff of the parish
76 of Orleans, who still holds the same, the execution thereof being suspended by injunction. That the seizure under the said writ was in accordance with the law of Louisiana in such cases made and provided; that is, the act of 1857, No. 189, p. 185, embodied and re-enacted in the Revised Statutes of 1870, sections 3624 to 3629, inclusive, and that by means and by reason of the premises the said mortgaged property, from the date of the seizure under the said writ until the present time, has remained under seizure, as it is now, without interruption and in the legal custody and possession of the civil sheriff of the parish of Orleans, under and in virtue of the said writ; all of which more fully appears by reference to the

copy of the said writ, and of the notices attached to the same,
77 and to the official statement and return of the said civil sheriff, the whole marked No. 2, herewith filed as part of this answer, and for greater certainty of averment.

Further answering, respondents plead and show that it is true, as alleged in the said bill, that after the sheriff had advertised for sale the mortgaged property seized under the said writ in No. 9804, respondent Spencer Field brought suit in the said sixth district court, No. 9878 of the docket, against Daniel Weaver and the civil sheriff, and obtained an injunction, which was granted without security, forbidding further proceedings under the said writ, and the said Spencer Field, for causes and reasons set forth in his petition in said suit, claimed damages of said Weaver, and also prayed
78 that the three promissory notes, and the mortgage given to secure them, all of date Nov'r, 1873, be decreed null and void, and be cancelled, and surrendered to him as owner thereof.

That the said Daniel Weaver excepted to the said proceeding, No. 9878, on several grounds, of which the first and second related to the form of proceeding by separate suit instead of by opposition, and to the sufficiency of the reasons alleged for injunction to authorize the granting of the injunction without bond; and the third was, that the reasons set forth were insufficient, and that the petition disclosed no cause of action; and the said Weaver also put the case at issue by pleading in the event of the overruling of
79 his excepting the general denial, and a claim for damages for the wrongful obtainining of the said injunction.

That such proceedings were had in said suit, that the exceptions were maintained, the injunction was dissolved, and the writ was dismissed; that Spencer Field appealed from said judgment; that upon said appeal the supreme court of Louisiana, by final decree rendered on or about the 7 April, 1879, decided that the causes of injunction set forth in the petition of Spencer Field were such as authorized the granting of the injunction without security, and that, if the averments of the said petitioner were true, both the notes and the mortgage were extinguished, the judgment of the district
80 court was reversed, and the cause was remanded for further proceedings; all of which more fully appears by reference to the duly certified copy of the opinion and decree of the said supreme court, marked No. 3, and to the file of the papers in the suit, No. 9878, in one package marked No. 4, all herewith filed as parts of this answer and for greater certainty of averment.

Respondents respectfully plead and show: That it is not the province, nor is it within the power and jurisdiction of this honorable court, to sit in judgment upon the said decision and decree of the supreme court of Louisiana, nor to inquire whether the
81 said injunction was properly granted and maintained, more especially in a collateral proceeding. That the said decree constitutes and is the thing adjudged between the parties. That it concluded Daniel Weaver and all persons whomsoever deriving from him upon the material questions put at issue as matters of law, and necessarily passed upon by the court; that is, 1st: That

Spencer Field had the right to proceed as he did in the suit No. 9878. 2d. That the allegations of the petitions of the petition were sufficient to authorize the grantihg of the injunctian without security. 3d. That if the averments in the petition were true the three notes and the mortgage in question were extinguished; and

82 respondents allege, and so the truth is, that Daniel Weaver had not, nor have any persons whomsoever deriving from him the right or power in any tribunal whatsoever to raise any question touching the said notes and mortgage, save and except as to the truth of the allegations in the petition in the suit No. 9878, upon which injunction was granted.

Respondents show that after the said decree had been rendered the said Daniel Weaver, on or about the 22 Dec'r, 1879, took out execution on a judgment which he had obtained against Spencer Field, in suit No. 10500, of the sixth district court, under and by virtue of

83 which the sheriff seized, and on the 12 Jan'y, 1880, sold and adjudicated to Daniel Weaver all the right, title, and interest of the said Spencer Field in and to a certain claim and to certain notes, and for damages, fully set forth in the suit of Spencer Field against Daniel Weaver, No. 9878 of the docket of the honorable the sixth district court for the parish of Orleans, as will appear by reference to the sheriff's *proces-verbal* of the said sale, marked No. 5, herewith filed as part of this answer, and for greater certainty of averment.

That subsequently the said Daniel Weaver, claiming to be the owner in virtue of said sale and adjudication to him, of all the right,

84 title, and interest of Spencer Field in and to the claims set up in the said suit, No. 9878, and that the said litigation had thereby ended, caused and procured judgment to be rendered by the said sixth district court, on the 22 Jan'y, 1880, dissolving the injunction and dismissing the suit, No. 9878, as will be seen by reference to the motion of said Weaver, and the judgment of the court on the same, in the package hereinbefore referred to and filed as No. 4.

That on the appeal of said Field from said judgment, the supreme court of Louisiana, by final decree rendered in December, 1880, reported in vol. 32 of the Louisiana Annual Reports, pages 1242 to

85 1244, inclusive, decided that the said Weaver did not acquire the ownership of the said notes in question by said sale and adjudication, and that the district court erred in dissolving said suit, and the said judgment was annulled, avoided, and reversed, and the cause remanded for further proceedings.

Respondents show that the seizure under execution, and the sale and purchase so made by Daniel Weaver, and his subsequent proceedings claiming under said purchase, virtually amounted to the confession on his part that he was not the owner of the said notes before the said purchase; that it was the right of Daniel Weaver, at

86 any time, and it was entirely in his power, to have forced a summary trial and a speedy determination of the said suit and injunction No. 9878; that the proceedings on his part indicated his intention to avoid a trial on the merits and inquiry as to the truth of the alleged causes of injunction, and that the

bringing of this suit pending said injunction, and after the two decisions of the supreme court of Louisiana, hereinbefore referred to, was in violation and in contempt of the said injunction and of the authority of the court by which it was granted.

And for further answer in this behalf, still protesting that this honorable court is without jurisdiction for causes and reasons apparent on the face of the bill, more particularly for want of equity in the bill, and not waiving any of the matters of defence
87 hereinbefore pleaded and set forth, but insisting and relying upon the same, respondents plead and show:

That Daniel Weaver never was the owner of the said notes, nor was he ever the holder of them for value or in good faith. That the said notes and the mortgage were made by respondent, Spencer Field, on the 1 Nov'r, 1873, for the sole purpose of enabling him to raise money for his own purposes by the sale or discount or other use of said notes. That the said mortgage was made in favor of James B. Williams, or any future holder, in order to facilitate the use of said notes; that said Field was in no manner in-
88 debted to said Williams; that Williams gave no consideration whatever for the said notes; that Williams was merely the nominal mortgagee without interest; that the said notes were never the property of said Williams, nor did he ever have them in his possession with the knowledge or consent of the said Spencer Field; that from the date of said notes they remained in the possession of respondent, Spencer Field, until he used them, and delivered them to Nathan C. Folger as security for a loan; that when the said loan debt was paid the said Folger returned the notes to respondent, Spencer Field, who retained them in his possession
89 until on or about the 8 of June, 1874, when he deposited them with Daniel Weaver, to be used, if practicable, to raise money for the uses and purposes of the said Field. That after the said notes had so been deposited, and while they were in the possession and custody of said Weaver, the said Weaver caused the said James B. Williams, the aforementioned nominal mortgagee, to pledge the said notes to him, Weaver, as security for the note of Williams for some $2,000. That said Williams had no power to make such pledge, and the same was a mere nullity, for the reasons that the said Williams did not have the said notes in his possession
90 and they did not belong to him at the time the said pledge was made; that said notes, at that time, belonged to respondent, Spencer Field, and they were at that time in the custody and possession of Daniel Weaver, to whom the facts with respect to the ownership and the possession of the said notes were, necessarily, known at the time said pledge was made. That respondent, Spencer Field, did not, at any time after the said notes were returned to him by Folger, as already stated, negotiate them, nor did he issue or deliver them to any person whomsoever for value. That by means and by reason of the premises the said notes and
91 mortgages were extinguished, and became of no effect, and that Daniel Weaver never had, nor have any persons whomsoever deriving from him, any right or cause of action whatever

against respondents, or any one of them, upon the said notes or the said mortgage.

Respondents desire to add that all the statements and allegations of fact in the preceding paragraph, beginning on page 13 of this answer, are made by respondent Spencer Field on his own personal knowledge; that they are made by respondents Spencer Field, Jr., and Frederick T. Field, on information, without personal
92 knowledge; and that they verily believe, and therefore allege, upon information and belief, that the said statements and allegations are true and correct.

Respondents specially deny that complainants are entitled to the remedy and relief prayed for by them, or to any other remedy or relief in this honorable court, on their bill of complaint and prayer.

And now, having fully answered, so far as they are advised it is material for them to answer, respondents are ready and willing to maintain and prove all the matters and things herein pleaded and set forth by them, as this honorable court shall direct; and they pray that they be hence dismissed with their reasonable costs and charges in this behalf sustained, and for general
93 relief, &c., and as in duty bound, &c.

N. O., 1 June, '82.
(Signed) R. H. MARR,
Sol'r for Respondents.

"*Replication.*" *Filed June* 6, 1882.

United States Circuit Court for the E. District of Louisiana. In Equity.

WEAVER *versus* FIELD *et al.*

The replication of Arthur C. Weaver, John V. Weaver, Ella F. Weaver, and her husband, George M. Lewis, Helen A. Weaver & Emily C. Weaver, complainants, to the joint and several answer of Spencer Field, Spencer Field, Jr., & Frederick T. Field, defendants.

These repliants, reserving unto themselves all and all manner of exception to the manifest insufficiencies of the said answer, for replication thereunto say: That they will aver and prove their said
94 bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is untrue and insufficient to be replied unto by these repliants without this: that any matter or thing whatsoever in the said answer contained, material, or effectual to be replied unto, confessed, and avoided, traversed, or denied, is true.

All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

(Signed) ROUSE & GRANT,
Solicitors for Complainants.

95 *"Supplemental Bill."* *Filed with leave of Court December 9th,* 1882.

United States Circuit Court, Eastern Dist. of Louisiana.

DANIEL WEAVER'S HEIRS
vs.
SPENCER FIELD *et al.*
No. 9366.

To the honorable the judges of the circuit court of the United States for the 5th circuit and eastern district of Louisiana:

The supplemental bill of John V. Weaver, Arthur C. Weaver, Ella F. Weaver & her husband, George M. Lewis, Emily C. Weaver, and Helen A. Weaver, sole, legal, and instituted heirs of Daniel Weaver, original complainant herein, now deceased.

Humbly complaining showeth that the said Daniel Weaver exhibited his certain original bill of complaint herein on the 8th day of April, 1881, against Spencer Field, Sr., Spencer Field, Jr., and Frederick T. Field; that afterwards, on the 18th day of No-
96 vember, 1881, your orators filed their certain supplemental bill in this cause reviving the same in their name as the sole, legal, and instituted heirs of the said Daniel Weaver, then deceased; that the defendants failing to oppose the revivor of said original bill, a decree was duly entered reviving said bill and permitting your orators to prosecute the same; and that afterwards the defendants, Spencer Field, Sr., Spencer Field, Jr., and Frederick T. Field, filed their certain answer and made appearance in the cause, and your orators filed replication to said answer, and the cause now stands at issue between your orator and the said defendants, all of which will more fully appear from the records in the cause. And your orators represent that the defendants
97 among other matters pleaded as a defense to said original bill, & in bar of the jurisdiction of this honorable court, that the real estate covered by the complainants' mortgage, and which the complainants prayed might be sold under a decree of this court to pay and satisfy the debt of your orators secured in and by said mortgage, was at the date of the filing of your orators' said original bill under seizure by and held in the possession of the civil sheriff of the parish of Orleans, by virtue of a writ of seizure and sale issued out of the late 6th district court for the parish of Orleans, in the suit of the said Daniel Weaver against Spencer Field, Sr., one of the defendants in this cause, and that the seizure and possession
98 of said real estate has continued ever since.

Now, your orator shows that the said suit of Daniel Weaver against Spencer Field, Sr., in the late 6th district court, abated by the death of said plaintiff on the 23 day of July, 1881; that your orators, as his duly instituted heirs, caused the record of such suit to be transferred, pursuant to law, into the civil district court for the parish of Orleans, on the 4 day of Dec., 1882, and that on the 5th day of the same month and year your orators caused said suit to be revived, and substituted themselves as plaintiffs therein under a

decree of the said last-named court. And your orators allege that since the filing of said bill they have directed and authorized the civil sheriff of Orleans parish, who held the
99 writ of seizure and sale issued out of the said late 6th district court in said case of Daniel Weaver *vs.* Spencer Field, to release and discharge his alleged seizure and possession of said real estate; that pursuant to such authority the said civil sheriff did, on the 5th day of December, 1882, release said real estate from the alleged seizure under said writ; and, on the same day, caused the inscription of seizure in the mortgage office of the parish to be cancelled and erased; and so your orator now avers that the obstacle pretended by these defendants to exist against the exercise of the proper jurisdiction has been removed, if it ever existed in fact, which is denied.

Your orators aver that the pretended possession of the said
100 sheriff of said real estate had been ousted by the defendants in this cause, or some one of them, prior to the institution of this suit; and they aver that the defendants, or some one of them, were themselves in the sole unobstructed possession, use, and enjoyment of said mortgaged premises at the date of the filing of the original bill in this cause, and have remained so in possession ever since.

To the end, therefore, that the defendants, Spencer Field, Sr., Spencer Field, Jr., and Frederick T. Field, may full and true answer make unto this supplemental bill, and that your orators may have the full benefit of their said suit against the above-
101 named defendants as they might or could have had in case said original bill had been filed after the cancellation of the pretended seizure recorded in the mortgage office as aforesaid, and that your orators may have such other and further relief in the premises as to your honors shall seem meet—

May it please your honors to grant unto your orators leave to file this supplemental bill, and that the defendants, Spencer Field, Sr., Spencer Field, Jr., and Frederick T. Field, may be directed to demur, plead, or answer thereto, according to the rules of practice in equity; that they may have the relief prayed in and — the said original bill filed by the said Daniel Weaver, deceased. And your orators will ever pray, &c.

(Signed) ROUSE & GRANT,
Solicitors for Compl'ts.

102 *Demurrer to Supplemental Bill. Filed Dec. 29th*, 1882.

U. S. Circuit Court. In Equity.

DANIEL WEAVER'S HEIRS
vs.
SPENCER FIELD and others } No. 9366.

The demurrer of Spencer Field, Spencer Field, Jr., and Frederick T. Field, defendants, to the supplemental bill of complaint of Daniel Weaver's Heirs, herein filed and exhibited.

These defendants, by protestation, no- confessing all or any of the

matters and things in the complainants' supplemental bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to the said supplemental bill, and for causes of demurrer they do plead and show:

103 First. That this honorable court was without jurisdiction of the original bill of complaint at the time it was filed, and at the time said supplemental bill was filed, by reason and because of matters apparent on the face of the said original bill, and therein alleged and set forth.

Second. That jurisdiction depends upon the state of facts existing at the time the suit is brought, and the want of jurisdiction existing at the time the suit — so brought cannot be cured or supplied by any matter or thing subsequently happening, which did not exist at the time of the bringing of the suit.

Third. That the matters and things in the said supplemental bill contained, in manner and form as the same are therein alleged and set forth, are not sufficient in law to give this honorable court jurisdiction of the said original bill, or of the causes of action in the said original and supplemental bills contained, set forth, and alleged.

Wherefore these defendants pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said supplemental bill, or to any of the mat-

104 ters and things therein contained.

And they pray to be hence dismissed, with their reasonable costs.

(Signed) R. H. MARR,
Solicitor for Defendants.

I, Robert H. Marr, solicitor for defendants, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

N. O., Dec. 26, '82.

(Signed) R. H. MARR.

Spencer Field, in his own right, and in his capacity as agent for his co-defendant, Frederick T. Field, who resides at San Antonio, in the State of Texas, and who is now absent from the State of Louisiana, and Spencer Field, Jr., being each and severally duly sworn, do each and severally depose and say that the foregoing demurrer is not interposed for delay.

(Signed) SPENCER FIELD.
" FRED. T. FIELD,
Per pro SPENCER FIELD.
" SPENCER FIELD, JR.

Order Overruling the Demurrer of Defendants to Supplemental Bill. Entered and Filed 14 *February*, 1883.

U. S. Circuit Court, Eastern District of La.

DANIEL WEAVER
v.
SPENCER FIELD *et al.* } No. 9366.

This cause came on to be heard upon the demurrer of the defend-

ants herein to the supplemental bill of complaint, and was argued by counsel.

On consideration whereof it is ordered, adjudged, and de-
105 creed that the said demurrer be, and the same is hereby, overruled at said defendants' costs.

February 14th, 1883.

(Signed) DON A. PARDEE, *Judge.*

Answer to Supplemental Bill. Filed 10 *March*, 1883.

United States Circuit Court, Eastern District of Louisiana. In Equity.

DANIEL WEAVER'S HEIRS
v.
SPENCER FIELD and others. } No. 9366.

Now come Spencer Field, Spencer Field, Jr., and Frederick T. Field, defendants in the above entitled cause, and protesting that this honorable court was without jurisdiction of the original bill, and that there is nothing in the supplemental bill alleged and set forth which can give the court jurisdiction of this cause, and not waiving any of, but specially reserving the full benefit of, and relying upon all the matters by them set up and pleaded to the original bill, and the bill of revivor herein filed and exhibited against them; also reserving the full benefit of all just and legal exceptions whatsoever to the supplemental bill herein filed and exhibited against them, especially of the demurrer to the said supplemental bill.

106 Nevertheless, for answer to the said supplemental bill, or to so much thereof as they are advised it is material for them to answer, they deny all and singular the statements and allegations in the said supplemental bill set forth and alleged, except as may be hereinafter admitted.

And for further answer in this behalf defendants plead and show:

That it is not true, as stated in the said supplemental bill, that the suit of Daniel Weaver against Spencer Field, in the late sixth district court, abated by the death of Daniel Weaver, on the 23 day of July, 1881, and they show, as the truth is, that by the law of Louisiana, as it has existed for more than fifty years past, and as it now exists, and more particularly by the Revised Code of Practice, articles 21, 120, 361, "Actions do not abate by the death of one of the parties after issue joined."

Defendants show that the release and discharge of the
107 seizure and possession of the real estate in question, and the return of the writ by the civil sheriff of the parish of Orleans, and the cancellation and erasure of the inscription of the seizure in the mortgage office of the parish of Orleans, on the 5 day of December, 1882, do not satisfy or in any manner impair the force and effect of the judgment *in rem*, the order of the late sixth district court, granting the writ and condemning the mortgaged property to be seized and sold in satisfaction of the mortgage debt; and

matters and things in the complainants' supplemental bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, do demur to the said supplemental bill, and for causes of demurrer they do plead and show:

103 First. That this honorable court was without jurisdiction of the original bill of complaint at the time it was filed, and at the time said supplemental bill was filed, by reason and because of matters apparent on the face of the said original bill, and therein alleged and set forth.

Second. That jurisdiction depends upon the state of facts existing at the time the suit is brought, and the want of jurisdiction existing at the time the suit — so brought cannot be cured or supplied by any matter or thing subsequently happening, which did not exist at the time of the bringing of the suit.

Third. That the matters and things in the said supplemental bill contained, in manner and form as the same are therein alleged and set forth, are not sufficient in law to give this honorable court jurisdiction of the said original bill, or of the causes of action in the said original and supplemental bills contained, set forth, and alleged.

Wherefore these defendants pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said supplemental bill, or to any of the mat-

104 ters and things therein contained.

And they pray to be hence dismissed, with their reasonable costs.

(Signed) R. H. MARR,
Solicitor for Defendants.

I, Robert H. Marr, solicitor for defendants, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

N. O., Dec. 26, '82.

(Signed) R. H. MARR.

Spencer Field, in his own right, and in his capacity as agent for his co-defendant, Frederick T. Field, who resides at San Antonio, in the State of Texas, and who is now absent from the State of Louisiana, and Spencer Field, Jr., being each and severally duly sworn, do each and severally depose and say that the foregoing demurrer is not interposed for delay.

(Signed) SPENCER FIELD.
" FRED. T. FIELD,
Per pro SPENCER FIELD.
" SPENCER FIELD, JR.

Order Overruling the Demurrer of Defendants to Supplemental Bill. Entered and Filed 14 *February*, 1883.

U. S. Circuit Court, Eastern District of La.

DANIEL WEAVER
v.
SPENCER FIELD *et al.* } No. 9366.

This cause came on to be heard upon the demurrer of the defend-

ants herein to the supplemental bill of complaint, and was argued by counsel.

On consideration whereof it is ordered, adjudged, and de-
105 creed that the said demurrer be, and the same is hereby, overruled at said defendants' costs.

February 14th, 1883.

(Signed) DON A. PARDEE, *Judge.*

Answer to Supplemental Bill. Filed 10 *March*, 1883.

United States Circuit Court, Eastern District of Louisiana. In Equity.

DANIEL WEAVER'S HEIRS
v.
SPENCER FIELD and others. } No. 9366.

Now come Spencer Field, Spencer Field, Jr., and Frederick T. Field, defendants in the above entitled cause, and protesting that this honorable court was without jurisdiction of the original bill, and that there is nothing in the supplemental bill alleged and set forth which can give the court jurisdiction of this cause, and not waiving any of, but specially reserving the full benefit of, and relying upon all the matters by them set up and pleaded to the original bill, and the bill of revivor herein filed and exhibited against them; also reserving the full benefit of all just and legal exceptions whatsoever to the supplemental bill herein filed and exhibited against them, especially of the demurrer to the said supplemental bill.

106 Nevertheless, for answer to the said supplemental bill, or to so much thereof as they are advised it is material for them to answer, they deny all and singular the statements and allegations in the said supplemental bill set forth and alleged, except as may be hereinafter admitted.

And for further answer in this behalf defendants plead and show:

That it is not true, as stated in the said supplemental bill, that the suit of Daniel Weaver against Spencer Field, in the late sixth district court, abated by the death of Daniel Weaver, on the 23 day of July, 1881, and they show, as the truth is, that by the law of Louisiana, as it has existed for more than fifty years past, and as it now exists, and more particularly by the Revised Code of Practice, articles 21, 120, 361, "Actions do not abate by the death of one of the parties after issue joined."

Defendants show that the release and discharge of the
107 seizure and possession of the real estate in question, and the return of the writ by the civil sheriff of the parish of Orleans, and the cancellation and erasure of the inscription of the seizure in the mortgage office of the parish of Orleans, on the 5 day of December, 1882, do not satisfy or in any manner impair the force and effect of the judgment *in rem*, the order of the late sixth district court, granting the writ and condemning the mortgaged property to be seized and sold in satisfaction of the mortgage debt; and

that an alias writ of seizure and sale could be demanded, and would be issued upon the said judgment and order at any time, but for the suit brought by defendant, Spencer Field, and the injunction granted to him in the said late sixth district court, which was pending and was undecided at the time the original bill herein was filed, and it still remains undecided.

That the said suit was not based upon, and the injunc-
108 tion was not asked for or granted for, any irregularity in the proceedings in the suit No. 9804, for there was no such irregularity. That the said suit, No. 9878, was based upon, and the injunction was granted for, causes and reasons set forth fully in the petition of defendant, Spencer Field, in said suit No. 9878, which causes and reasons were held and decided by the supreme court of Louisiana, in last resort, on or about the 7 April, 1879, on the appeal taken by said Field from the judgment of the district court in said suit No. 9878, to which appeal Daniel Weaver was a party appellee, to be good and sufficient in law; and the said supreme court also decided on the said appeal that if the averments of the said petition were true, the said notes and mortgage were extinguished.

That the law of Louisiana, at the time said suit No. 9878 was brought, required, as it requires now, that the allegations of fact
109 upon which an injunction is asked for be sworn to by the party praying for the injunction. That the allegations of the petition in said suit No. 9878 upon which the said injunction was asked for and was granted, were sworn to by the said Spencer Field, and they are and must be assumed to be true, as between the parties, their privies and successors, until, in the suit and proceeding in which the injunction has been granted, they have been proven not to be true; and that the said suit and injunction, so long as they remain undecided, or not disposed of judicially, constitute an insuperable obstacle, and a perpetual bar to the jurisdiction of this honorable court, and of any other judicial tribunal to enforce the notes and mortgage in question at the instance and suit of Daniel Weaver, or of any person whomsoever deriving from him.

That the said original bill was the attempt on the part of Daniel Weaver, and the subsequent proceedings in this cause, by and on behalf of complainants, was the attempt, on their part, to
110 shift the burden of proof, to avoid the force and effect of the said suit No. 9878, and of the injunction in said suit granted, and to evade the same, contrary to equity and good conscience, and in violation of the rights of defendants, and in contempt of the authority of the State court, to which the said Daniel Weaver had resorted, voluntarily, and of his own free choice and election.

Defendants show that this honorable court was without jurisdiction at the time the original bill was filed, at the time the bill of revivor was filed, and at the time the said supplemental bill was filed; that the obstacles to the jurisdiction of this honorable court have not been removed, and this honorable court hath not acquired, or been vested with, jurisdiction to hear and determine this cause.

Defendants show and plead, that the possession of the real estate in question, by the sheriff, was not pretended, but was real

111 and that this possession was preserved and maintained by the inscription in the mortgage office.

That the law of Louisiana does not require the sheriff of the parish of Orleans, when he seizes real estate, to dispossess or to turn out of possession the owner or the mortgagor; that the precise object of the law authorizing and requiring the inscription of seizures of real estate was to prevent the necessity of actual physical possession by the sheriff, and to preserve the seizure and possession under the writ from the date of the seizure until the sale; that the real estate in question was taken into possession by the sheriff, and it continued to be in his possession, by the means and in the mode prescribed by law, from the date of the seizure, in February, 1878, until the return of the writ and the cancelling and erasure of the inscription, on the 5 of December, 1882, as set forth and alleged in the said supplemental bill; and that it was not possible, in law or in fact, for the defendants, or any of them, to have ousted the
112 possession of the sheriff so long as he retained the writ in his hands and the inscription remained uncancelled in the mortgage office.

Defendants specially deny that complainants are entitled to the remedy and relief prayed for by them, or to any remedy or relief in this honorable court in the premises.

And now, having fully answered so far as they are advised it is material for them to answer, defendants are ready and willing to maintain and prove all the matters and things herein set forth and pleaded by them as this honorable court shall direct; and they pray to be hence dismissed, with their reasonable costs and charges in this behalf, and for general relief in the premises, and as in duty, etc.

N. O., 8 Mar., '83.

(Signed) R. H. MARR,
Sol'r for Defendants.

Replication to Answer to Supplemental Bill. Filed 15 *March*, 1883.

United States Circuit Court for the District of Louisiana.
113 In Equity.

DANIEL WEAVER
v.
SPENCER FIELD *et als.* } No. 9366.

The replication of John V. Weaver, Arthur C. Weaver, Ella F. Weaver, Geo. M. Lewis, Emily C. Weaver, and Helen A. Weaver, complainants, to the answer of Spencer Field, Spencer Field, Jr., and Frederick T. Field to the complainant's supplemental bill, defendants.

These repliants, reserving unto themselves all and all manner of exception to the manifest insufficiencies of the said answer, for replication thereunto, say that they will aver and prove their said supplemental bill to be true, certain, and sufficient in the law to be

answered unto, and that the said answer of the said defendants is untrue and insufficient to be replied unto by these repliants, without this, that any matter or thing whatsoever in the said answer contained material or effectual to be replied unto, confessed and avoided, traversed or denied is true.

114 All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said supplemental bill they have already prayed.

(Signed) ROUSE & GRANT,
Solicitors for Complainant.

Hearing and Submission. Extract from the Minutes. November Term, 1883.

NEW ORLEANS, MONDAY, *December* 24, 1883.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

DANIEL WEAVER
v. } 9366.
SPENCER FIELD *et al.*

This cause came on to be heard on the bills, original and supplemental, the answers to the same, the replications, and other proceedings therein.

Whereupon the complainants offered the following evidence in support of their bills, to wit:

1. The act of mortgage annexed to the bill of complaint as Exhibit "A."

115 2. The three notes, one for $2,000 and two for $1,500 each, made by Spencer Field and described in said act of mortgage Exhibit "A," and in the bill of complaint.

3. The act of sale annexed to the bill as Exhibit "B."

4. The act of sale annexed to the bill as Exhibit "C."

And the defendants offered the following evidence in support of their answers, viz:

1st. The Exhibits 1, 2, 3, 4, 5 filed with the answer.

2d. The decision of the supreme court of Louisiana in the suit of Field *v.* Weaver, reported in 32 Annual, pp. 1242, '3, '4.

3d. The depositions of Spencer Field and James B. Williams, taken and reported by T. Wharton Collens on the 9th April, 1883, together with the exhibits.

Whereupon the cause was argued by the counsel for the parties, respectively, and submitted, and the court took time to consider.

Exhibit A, act of mortgage, annexed to bill of complaint
116 in this cause, is transcribed on folio 14 of this transcript.

Note for $2,000, made by Spencer Field, and described in said act of mortgage, Exhibit "A," and in the bill of complaint offered by complainant, and filed 24th Dec'r, 1883:

$2,000.00. NEW ORLEANS, *November 1st*, 1873.

One year after date I promise to pay to the order of myself two thousand dollars, value received, bearing interest at the rate of eight per cent. per annum from maturity until paid.

(Signed) SPENCER FIELD.

(Endorsed:) Spencer Field.

[Written across the face in red ink:] *Ne varietur.* Secured by mortgage by act passed before me this day. New Orleans, Novem'r 1st, 1873. (Signed) W. J. Castell, not. pub.

Note for $1,500, made by Spencer Field, and described in said act of mortgage, Exhibit "A," and in the bill of complaint offered by complainant, and filed 24th Dec'r, 1883:

$1,500.00. NEW ORLEANS, *November 1st*, 1873.

Two years after date I promise to pay to the order of myself fifteen hundred dollars, value received, bearing interest at the rate of eight per cent. per annum from maturity until paid.

117 (Signed) SPENCER FIELD.

(Endorsed:) Spencer Field.

[Written across the face in red ink:] *Ne varietur.* Secured by mortgage by act passed before me this day. New Orleans, Nov. 1st, 1873. (Signed) W. J. Castell, not. pub.

Note for $1,500, made by Spencer Field, and described in said act of mortgage, Exhibit "A," and in the bill of complaint offered by complainant, and filed 24th December, 1883:

$1,500.00. NEW ORLEANS, *November 1st*, 1873.

Three years after date I promise to pay to the order of myself fifteen hundred dollars, value received, bearing interest at the rate of eight per cent. per annum from maturity until paid.

(Signed) SPENCER FIELD.

(Endorsed:) Spencer Field.

[Written across the face in red ink:] *Ne varietur.* Secured by mortgage by act passed before me this day. New Orleans, Novem. 1st, 1873. (Signed) W. J. Castell, not. pub.

Exhibit "B," act of sale, annexed to the bill of complaint in this cause, is transcribed on folio 28 of this transcript.

Exhibit "C," act of sale, annexed to the bill of complaint in this cause, is transcribed on folio 40 of this transcript.

EXHIBIT No. 1—*Offered by Defendants. Filed with the Answer December* 24, 1883.

No. 9804. NEW ORLEANS, *February 13th*, 1873.

118 D. WEAVER *v.* SPENCER FIELD.

STATE OF LOUISIANA,
Sheriff's Office, Parish of Orleans.

To the recorder of mortgages for the parish of Orleans and city of New Orleans:

Please to take notice that by virtue of a writ of seizure and sale issued in the above-mentioned suit, I have seized and taken into my possession the following described property, to wit:

A certain piece or portion of ground, together with all the buildings and improvements thereon, situate in the Faubourg Livauda-s, in the fourth district of this city (late parish of Jefferson), in this State, in the square No. 60 of said Faubourg, said square being comprised within Washington, Live Oak (or Constance), Magazine, and Sixth streets. Said lot is designated by the No. 5 on a plan, No. 32, of the book of plans of the late G. R. Stringer, notary. Said lot measures per said plan 31 feet 8 inches front on Washington street, by 150 feet 9 inches deep between parallel lines.

To pay and satisfy the writ issued in this case, say the sum
119 of $5,000.00, with interest and cost.

(Signed) P. S. CAMPBELL,
Deputy Sheriff.

I, the undersigned, recorder of mortgages in and for the parish of Orleans, State of Louisiana, do hereby certify that the above is a true and correct copy from the original as appears on file in this office, which said original was recorded in B. 156, fo. 400, on the thirteenth day of February, 1878.

New Orleans, May thirtieth, 1882.

[SEAL.] (Signed) GEO. GUINAULT, *D'y.*

EXHIBIT No. 2.—*Offered and Filed by Defendant with Answer December* 24, 1883.

Writ of Seizure and Sale.

STATE OF LOUISIANA:

Sixth District Court for the Parish of Orleans.

D. WEAVER
vs.
SPENCER FIELD. } No. 9804.

State of Louisiana to Thos. H. Handy, civil sheriff, Greeting:

You are hereby commanded in the name of the State of
120 Louisiana and of the sixth district court for the parish of Orleans—

To seize and sell for cash without appraisement and according to

law the property described in the act of mortgage hereto annexed, and made a part of this writ, and out of the proceeds thereof to pay petitioner the following amount, viz:

1st. Two thousand dollars with eight per cent. interest per annum from 1st November, 1874, until paid.

2nd. Fifteen hundred dollars with like interest from 1st Nov'b'r, 1875, till paid.

3rd. Fifteen hundred dollars with like interest from 1st Novb., 1876, till paid.

4th. Five per cent. attorney's fees and all costs of suit.

And what you do in the premises you make return thereof, together with this writ to our said court, as the law directs.

Witness the Honorable N. H. Rightor, judge of our said court, this 13th day of Feb'y, in the year of our Lord one thousand eight hundred and seventy-eight, and in the one hundred and sec-
121 ond year of the Independence of the United States.

(Signed) H. MIESTER,
D'y Clerk.

Sheriff's Return.

Received Feb. 13th, 1878, and on February 13th, 1878, Thomas H. Handy, then civil sheriff of this parish, seized the property described in the within annexed notice of seizure marked "A," and which said notice of seizure, with the returns on the reverse of the same, are herewith made part of this return, and said late sheriff caused the seizure of said property to be duly recorded in the office of the recorder of mortgages in and for the parish of Orleans and city of New Orleans. He also seized the rents in the hands of the tenants of said property, as will appear by the within annexed notice of seizure marked "B," which, with the return on the reverse of the same, is herewith made part of this return, but whether said late sheriff collected any rents from said tenants I am unable to state.

And no payment being made by the defendant, said late sheriff advertised said property for sale on Feb'y 19th, 1878, an-
122 nouncing the sale to take place on the — day of March, 1878, when on the 14th of March, 1878, said sale was stayed by virtue of a writ of injunction at the suit of Spencer Field *v.* D. Weaver, No. 9878 of the docket of the sixth district court for the parish of Orleans.

Subsequently said injunction having been dissolved said property was again advertised for sale on April 6th, 1878, announcing the sale to take place on the 7th of May, 1878, when on the 18th of April, 1878, said sale was again stayed, a suspensive appeal having been taken from the judgment dissolving the injunction above referred to.

This writ was transferred by the said Thomas H. Handy, sheriff, to his successor in office, J. R. Alcee Gauthreaux.

And on the 2nd of January, 1879, J. R. Alcee Gauthreaux, late sheriff, seized the rents in the hands of the tenants occupying said property, as will more fully appear by reference to the within

annexed notice of seizure marked "C," and which said
123 notice of seizure marked "C," with the return on the reverse of the same, is herewith made part of this return, and from rents the said late Sheriff Gauthreaux collected the sum of one hundred and thirty-five dollars ($135), which amounts is still in said late sheriff's hands according to the books in this office. Said rents were subsequently released by said sheriff.

The property herein seized was advertised for sale by said Sheriff Gauthreaux on the 28th January, 1880, announcing the sale to take place on February 28th, 1880, as per orders from the plaintiff's attorney, when on February 4th, 1880, said sale was stayed by order of plaintiff's attorney.

This writ was transferred by said Gauthreaux to Thomas Duffy, present sheriff, on the 2nd August, 1880, and the seizure of the property herein is still continued in full force.

N. O., April 22nd, 1881.

(Signed) ERNEST RIKER, *D'y Sh'ff.*

CIVIL SHERIFF'S OFFICE,
NEW ORLEANS, *May* 31, 1882.

124 I hereby certify that the original of this writ (and returns thereon, of which the present are copies) is still in my possession and in force.

(Signed) ERNEST RICKER, *D'y Sh'ff.*

Notice of Seizure, Marked "A."

In the Sixth District Court for the Parish of Orleans.

D. WEAVER
vs.
SPENCER FIELD. } No. 9804.

SHERIFF'S OFFICE, PARISH OF ORLEANS,
NEW ORLEANS, *February 13th*, 1878.

To Spencer Field:

Take notice that I have seized and in three days from the service thereof shall proceed to advertise and sell according to law the following-described property, to wit:

A certain piece or portion of ground, together with all the buildings and improvements thereon, situated in the Faubourg Livandais, in the fourth district of this city (late parish of Jefferson, in this State), in the square No. 60 of said faubourg, said square being comprised within Washington, Live Oak (or Constance), Magazine, and Sixth streets. Said lot is designated by the No. "5" on a plan No. "32" of the book of plans of the late G. R. Stringer, notary. Said
125 lot measures per said plan 31 feet 8 inches front on Washton street by 150 feet 9 inches deep between parallel lines, to pay and satisfy the writ, is sued in this case, say the sum of $5,000.00, with interest and costs, unless the same is immediately paid.

(Signed) P. S. CAMPBELL,
Deputy Sheriff.

On the 14th day of February, 1878, I served a true copy of the within notice of seizure on the defendant herein, Spencer Field, by leaving the same at his domicile, No. 14, Baronne street, in the hands of Theresa Mullan, a person apparently over the age of 14 years, living and residing therein, whose name and other facts connected with this service I ascertained by interrogating the said Theresa Mullan, the defendant herein being absent from home at the time of said service.

(Signed) W. W. WILSON,
D'y Sheriff.

RECORDER OF MORTGAGE OFFICE,
PARISH OF ORLEANS, STATE OF LA.

A copy of the within writ on file in this office was recorded
126 on the 13th of February, A. D. 1878, in book 156, f. 400.
New Orleans, July 19th, 1879.
(Signed) J. G. RICHARDSON, *D'y R.* [SEAL.]

Notice of seizure to recorder annexed to sheriff's return is transcribed on folio 117 of this transcript.

Sheriff's Return.

On the 13th of February, 1878, served copy of the foregoing notice of seizure on J. G. Richardson, deputy recorder of mortgages for the parish of Orleans.

(Signed) W. W. WILSON,
Deputy Sheriff.

(Endorsed:) Civil sheriff's office, New Orleans, May 31st, 1882.

I hereby certify that this notice of seizure is a true and exact copy of the one entered in the "sheriff's seizure of book of real estate," a copy of which was served on the recorder of mortgages of February 13, 1878, as will appear by the copy of the sheriff's return hereon endorsed.

(Signed) ERNEST RICKER,
D'y Sheriff.

Notice of Garnishment, marked "B."

127 STATE OF LOUISIANA.

In the Sixth District Court for the Parish of Orleans.

SHERIFF'S OFFICE, PARISH OF ORLEANS,
NEW ORLEANS, *Feb'y 14th*, 1878.

D. WEAVER
v.
SPENCER FIELD. } No. 9804.

To M. H. Marks, Calhoun Marks, personal:

Take notice, That by virtue of a writ of seizure and sale herein to

me directed, I seize and demand of you the rent now due, and which may hereafter become due, pending the seizure herein made, for the occupation of premises situated No. 130 and 132 Washington street, which you will pay over to me.

(Signed) W. W. WILSON,
Deputy Sheriff.

Sheriff's Return.

On the 14th day of February, I served a true copy of the within notice of garnishee on the tenants herein in person.

(Signed) W. W. WILSON,
D'y Sheriff.

Notice of Garnishment, marked "C."

STATE OF LOUISIANA:

In the Sixth District Court for the Parish of Orleans.

SHERIFF'S OFFICE, PARISH OF ORLEANS,
NEW ORLEANS, *January 2nd*, 1879.

D. WEAVER
v. } No. 9804.
SPENCER FIELD.

128 To tenants at No. 130 and 132 Washington street, Mrs. Sarah W. Hanna, at No. 130 Washington street, Mrs. M. H. Marks, at No. 132 do., do.:

The property occupied by you, and situated at No. 130 Washington street and No. 132 Washington street, being under seizure by the sheriff in the above cause, you are hereby notified to pay unto me all rents now due and which may become due by you on said property, which you will pay over to me.

(Signed) A. J. DUMESTRE,
Deputy Sheriff.

Sheriff's Return.

On the 2nd January, 1879, served a rent garnishee on Marian H. Marks, who pays $15.00 per month rent, due 1st February, 1879. On the 3rd January, 1879, served a rent garnishee on Mrs. Sarah W. Hanna, who pays $15.00 a month, who pays monthly in advance, has paid to S. Field, January in advance.

(Signed) A. J. DUMESTRE,
D'y Sheriff.

EXHIBIT No. 3.—*Offered and Filed by Defendants with Answer, December* 24, 1883.

129 Supreme Court of the State of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, 7 *April*, 1879.

SPENCER FIELD
v.
DANIEL WEAVER. } No. 7159.

Appeal from the sixth district court for the parish of Orleans.

Mr. Justice White delivered the opinion and decree of the court in the words and figures following, to wit:

The defendant having obtained an order for the issuance of executory process on certain notes secured by mortgage, the plaintiff in injunction, who was defendant in the proceedings for seizure and sale, obtained an injunction without bond, staying further proceedings on a petition alleging substantially, as follows: That the notes sued on were not the property of the original plaintiff, but were the property of the defendant, having been left with Weaver on deposit. The exact language of the petition is, "petitioner further represents

130 that he placed said notes in the hands of said Weaver, on or about the 8th of June, 1873, nearly one year after they were made, that the debt and mortgage given to secure them was extinguished by petitioner becoming the owner and holder of said notes long after they were made and executed. The prayer is for an injunction for its perpetuation, and that the said notes and mortgage given to secure their payment be decreed null and void and cancelled, and that the same be surrendered to petitioner as owner thereof.

The defendant excepted on the following grounds:

1st. Because the petition for injunction was in form an original suit, and not an opposition under C. P., 738.

2d. Because the reasons were insufficient to justify the issuance of an injunction without bond.

3d. No cause of action.

4th. That the petititioner could by a prayer for damages convert a summary into an ordinary suit.

131 The lower court maintained the exception and dismissed the petition. The conclusion was erroneous.

1st. The petition was not qualified as one of opposition, but its allegations and prayer clearly gave it that character. The court so considered it, for in giving the order for injunction it said: "Let an injunction issue as prayed for herein, as provided in art. 739, C. P., par. 6."

2d. The petition avers that the notes had been deposited with the plaintiff in the executory process, who had wrongfully appropriated them; that they were the property of the defendant in the seizure and sale, hence were extinguished. These averments are directly within the 3rd paragraph of art. 739, C. P., which authorises the injunction upon the ground "That it has been extinguished by trans-

action, novation, or some other legal manner." Nor can we serve any useful purpose by presently examining whether it, as used in the law, refers to the debt or the mortgage, by which payment
132 is secured. For in the present case, if the averments of the petition be true, both the note and mortgage are extinguished.

3d. This ground is covered by our conclusion as to the sufficiency of the former.

4th. If the prayer for damages was unauthorised, it could not prejudice the original plaintiff or deprive him of a summary trial.

In addition to these grounds, it is urged in the brief of counsel that the petition for injunction is not sworn to as required by C. P., 738. This ground does not appear to have been urged below, as one of the exceptions refers to the petition as "an application for injunction on mere affidavit without bond." The petition, however, is sworn to. At the end of the petition, after the signature of the attorney, is the signature of the plaintiff, followed by the usual *jurat*, signed by a deputy clerk, viz., sworn to and subscribed before, etc.

This was a swearing to the petition, and hence to the facts
133 and allegations therein.

Judgment reversed and case remanded, to be proceeded with according to law, costs of appeal to be borne by appellee.

A true copy.

[SEAL.] (Signed) T. McC. HYMAN,
D'y Clerk.

EXHIBIT No. 4.—*Offered and Filed by Defendants with Answer, December* 24, 1883.

Petition for Injunction. Filed 13th March, 1878.

SPENCER FIELD
v.
D. WEAVER. } No. 9878.

To the honorable the sixth district court for the parish of Orleans:

The petition of Spencer Field, a resident of the city of New Orleans, respectfully represents: That Daniel Weaver, also a resident of the city of New Orleans, has wrongfully and illegally brought suit in this honorable court against your petitioner, being No. 9804 of the docket, entitled D. Weaver *v.* Spencer Field, representing, in substance, that he is the holder and owner of three certain
134 promissory notes, dated at New Orleans on the 1st of November, 1873, and payable at one, two, and three years after date, one for the sum of two thousand dollars, and two for the sum of fifteen hundred dollars each, drawn and endorsed by petitioner, and bearing interest at the rate of 8 per cent. per annum from maturity until paid, and that the payment of said notes, in capital and interest as well as attorney's fees, fixed at 5 per cent. on the sum due, in case of suit, was secured by special mortgage, as per act before W. J. Castell, notary public, in this parish, on the 1st of November, 1873, on the following-described real estate, to wit: A certain piece

or portion of ground, together with all the buildings and improvements thereon, situated in the Faubourg Livandais, in the fourth district of this city, in square bounded by Washington, Live Oak, Constance, Magazine, and Sixth streets, measuring thirty-one feet eight inches front on Washington street by one hundred and
135 fifty feet nine inches deep between parallel lines, and pray for executory process against said property, and that a writ of seizure and sale has been issued in said suit, under which Thomas H. Handy, civil sheriff of the parish of Orleans, has seized, advertised, and is about to sell the property hereinabove described, all of which will more fully appear from the petition, order, and notice of seizure in the said suit, entitled D. Weaver *v.* Spencer Field (petitioner), No. 9804 of the docket.

Petitioner further represents the said writ of seizure and sale were obtained by the said Daniel Weaver by fraud and misrepresentation in this, that he is not now, and never has been, the holder and owner of the said three promissory notes; that they are now, and always have been, the property of petitioner; that he claims to be the holder of them through a certain act of pledge executed by J. B. Williams by act before Theodore Guyol, notary public, in this parish, and dated on the 11th of June, 1874, to secure the payment of his,
136 said Williams', note of the same date, for the sum of $2,000; that said J. B. Williams did not hold or own said notes at the time of executing said act of pledge, and had, therefore, no power or authority to pledge the same, and that at the time of the execution of said act said notes were in possession of the said Weaver on deposit and as the property of petitioner, all of which facts were well known to the said Daniel Weaver at the time of the execution of said act of mortgage.

Petitioner further represents that he placed said notes in the hands of said Weaver on or about the 8th of June, 1873, nearly one year after they were made; that the debt and mortgage given to secure them was extinguished by petitioner becoming the owner and holder of said notes long after they were made and executed, and that a writ of injunction is necessary to restrain and prevent the said D. Weaver from proceeding any further in said suit on said note.

137 Petitioner further represents that he is desirous of having the order of seizure and sale hereinabove referred annulled and said notes decreed to be the property of petitioner and extinguished together with the mortgage given to secure the same.

Petitioner further represents that the wrongful and illegal acts of the said Daniel Weaver have caused petitioner great trouble, annoyance, and expense, and petitioner claims damages therefor in the sum of one thousand dollars from the said D. Weaver.

Wherefore petitioner prays that in consideration of the premises the affidavit annexed that a writ of injunction do issue enjoining and restraining the said Daniel Weaver and Thomas H. Handy, civil sheriff, from proceeding any farther with the writ of seizure and sale issued in the case of D. Weaver *v.* Spencer Field (petitioner),

No. 9804 of the docket, and that the said Daniel Weaver be
138 cited to appear and answer this petition, and after due proceedings had that the injunction herein issued be made perpetual and the said notes and mortgage given to secure their payment be decreed null, void, and cancelled, and that they be surrendered to petitioner as owner thereof, and the said Daniel Weaver be condemned to pay petitioner the said sum of one thousand dollars, with 5 per cent. interest from judicial demand, and all costs of suit, and petitioner prays for general relief.

(Signed) BENTINCK EGAN,
Attorney.

(Signed) SPENCER FIELD.

Sworn to and subscribed before me, this 13th March, 1878.

(Signed) PHILIP POWER, JR.,
Deputy Clerk.

Order.

Let a writ of injunction issue herein as prayed for without bond, as provided for in article 739, Code of Practice, paragraph 6.

New Orleans, March 13th, 1878.

(Signed) N. H. RIGHTOR, *Judge.*

139 *Appearance. Filed* 19 *March*, 1878.

Sixth District Court, Parish of Orleans.

FIELD
v.
WEAVER. } No. 7878.

Daniel Weaver comes into court and excepts to proceedings herein for the following reasons:

1st. Because, if allowable, they are to be presented in the form of an opposition, and in that of a direct and independent suit from the original case stated in the petition herein.

2d. Because the reasons alleged in support of the application for an injunction on mere affidavit and without bond are not among those specified by the law, in which that remedy is permitted without giving security.

3d. Because the reasons set forth are insufficient and the petition discloses no cause of action.

4th. Because the petitioner cannot, by engrafting a frivolous claim for damages, change the summary character of the proceedings if properly instituted.

140 And this appearer, setting up the foregoing exceptions *seriatim*, moves that they be sustained and this suit dismissed with costs and for general relief; and should the exceptions be overruled, then this appearer denies all the facts and allegations set forth by the petitioner, and charges that the injunction issued was wrongfully obtained and has worked damage on him in the shape of attorney's fees fixed at three hundred dollars and otherwise.

Wherefore appearer prays that plaintiff's injunction be dissolved with all the damages, real and exemplary, allowable in law, including said attorney's fees fixed at five hundred dollars, and appearer prays for such other and further relief in the premises as the nature of the case may require and the law permit.

(Signed) E. BERMUDEZ, *Attorney.*

141 *Judgment.*

Sixth District Court for the Parish of Orleans.

SPENCER FIELD
v.
D. WEAVER. } No. 9878.

This cause came on this day for trial on the exception herein filed.

B. Egan for plaintiff: E. Bermudez, for defendant and exceptor.

After hearing pleadings and argument of counsel for the reasons orally assigned by the court, the law and evidence being in favor of defendant and exceptor—

It is ordered that said exception be sustained, the injunction herein issued be dissolved, and that plaintiff's suit be dismissed with costs.

Judgment rendered April 3d, 1878.

Judgment signed April 8th, 1878.

(Signed) N. H. RIGHTOR, *Judge.*

Motion for Suspensive Appeal and Bond. Filed 17th April, 1878.

6th District Court.

SPENCER FIELD
v.
D. WEAVER. } 9878.

142 On motion of B. Egan, attorney for plaintiff in the above cause, and on suggesting to the court that he is informed and believes there is error to his prejudice in the final judgment rendered in the above cause on the 3rd of April, 1878, and signed on the 8th of April, 1878; that he is aggrieved by said final judgment, and is desirous of taking a suspensive appeal therefrom to the honorable supreme court of the State of Louisiana:

Therefore it is ordered by the court that plaintiff in the above cause be allowed a suspensive appeal from the above judgment, returnable in the supreme court of the State of Louisiana on the 1st Monday in May, 1878 (there not being sufficient time to complete the record before that time), on giving bond and surety conditioned according to law in the sum of one hundred dollars.

Act of Sale. Filed 22nd Jan'y, 1880.

J. R. Alcée Gauthreaux, civil sheriff. Sale by the civil sheriff of the parish of Orleans.

Be it remembered that on the twelfth day of January
143 in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundredth and fourth,

By virtue of a writ of *fieri facias* to me directed by the honorable the sixth district court for the parish of Orleans, on the 22nd of December, 1879, at suit of Daniel Weaver *vs.* Spencer Field, number 10500 of the docket of the said sixth district court for the parish of Orleans. And the publications and advertisements required by law having been duly made in the following manner, viz: The New Orleans Daily Democrat, in the English language, on the 31st of December, 1879, and the 6th and 12th of January, 1880,

I, Ernest Ricker, a deputy civil sheriff of the parish of Orleans, did, at the hour of twelve o'clock M., repair to Merchants' and Auctioneers' Exchange, Royal street, between Canal and Custom-house streets, second district of this city, and then and there, after having first announced in a loud and audible voice the terms
144 and conditions hereinafter expressed and specified, I did expose for public sale, at auction, the following described property, which was adjudicated to the highest and last bidder, to wit, all the right, title and interest of the defendant, Spencer Field, in and to a certain claim, and to certain notes, and for damages, fully set forth and described in the suit of Spencer Field *vs.* D. Weaver, No. 9878 of the docket of the honorable the sixth district court for the parish of Orleans, which suit is still pending and undecided, to Daniel Weaver, for the price and sum of ten ($10) dollars.

Terms: Cash.

Thus done and closed, the present *proces-verbal* of sale, amounting to ten ($10) dollars and – cents.

(Signed) ERNEST RICKER,
Deputy Sheriff.

Witnesses:
(Signed) LEWIS W. BARTLETT.
(Signed) JOHN A. McDONALD.

Judgment.

6th Dist. Court, Parish of Orleans.

145 SPENCER FIELD
v.
DANIEL WEAVER. } No. 9878.

On motion of E. Bermudez, of counsel for Daniel Weaver, and on showing to the court that all the righs, title, and interest of the plaintiff, Spencer Field, in and to the claims herein have been duly seized, adjudicated, and sold to mover in the case of Daniel

Weaver *v.* Spencer Field, No. 10500 of the docket of this court, on the 12th January, 1880, as appears by the sheriff's deed and the record in said case No. 10500, now filed, and that said litigation has ended—

It is ordered that the injunction herein issued be dissolved. and that the writ enjoined be proceeded with and this suit be dismissed.

Judgment rendered January 22, 1880.

Judgment signed January 27, 1880—(1) one word erased—approved before signing.

(Signed) N. H. RIGHTOR, *Judge.*

Motion and Bond for Appeal. Filed 2d February, 1880.

6th District Court.

SPENCER FIELD
v.
DANIEL WEAVER. } No. 9878.

146 On motion of Bentinck Egan, attorney for plaintiff in the above cause, and on suggesting to the court that he is informed and believes that there is error to his prejudice in the final judgment rendered in the above cause on the 22nd of January, 1880, and signed on the 27th of January, 1880, that he is aggrieved by said final judgment, and is desirous of taking a suspensive appeal therefrom to the honorable supreme court of the State of Louisiana:

It is therefore ordered by the court that the said Spencer Field be allowed a suspensive appeal from the above judgment, returnable in the supreme court of the State of Louisianable on the third Monday of February, on giving bond and security conditioned according to law, in the sum of one hundred dollars.

Decision of the Supreme Court of Louisiana in the Suit of Field v. *Weaver, reported in* 32 *Annual, pp.* 1242, 3, 4, *offered by Defendants.*

Appeal from the Sixth District Court for the Parish of Orleans.

SPENCER FIELD
v.
DANIEL WEAVER, } No. 7825.

147 The opinion of the court was delivered by Fenner, J.:

Weaver, as holder of mortgage notes made by Field, issued executory process against the mortaged property owned by Field. Field brought this suit to enjoin the executory process, alleging that the mortgage notes were held by Weaver merely as depository for him (Field), who had himself acquired them after issuance, whereby the notes and the mortgage given to secure them were extinquished by confusion. He prayed for injunction for judgment, declaring the notes and mortgage extinguished, and for damages.

Weaver, as owner of another monied judgment against Field, issued execution and seized all the right, title, and interest of Field in and to the claim, and to the notes and to the damages set forth and described in this injunction suit of Field *v.* Weaver. At the sale thereof, Weaver himself became the purchaser.

He then appeared in this suit of Field against himself, and
148 presented the sheriff's adjudication of Field's right therein, and suggesting that by his purchase thereof, the litigation was ended. On his *ex parte* motion, without notice to Field, the judge rendered and signed judgment ordering "that the injunction herein issued be dissolved, and that the writ enjoined be proceeded with, and this suit dismissed."

From this judgment Field has taken the present appeal.

We think it very clear that the judgment cannot be sustained.

By the sheriff's sale, Weaver acquired only such rights of Field asserted in the suit as could be sold. He did not acquire any right in and to the notes as property, because Field did not assert any ownership of, or property in the notes, but contended that the notes were no longer in existence as property, but had been extinguished by confusion. The only rights he asserted in the suit in reference thereto were the rights to have the notes and mortgage not extinguished, because he averred that they had already been extinguished, but simply declared extinguished. He could not
149 assert a right of property in his own notes. An additional right claimed by Field in the suit was the right to enjoin and restrain the seizure and sale of his property under a pretended debt and mortgage, which he averred had been extinguished, and did not exist.

We are clearly of opinion that such a right cannot be seized and sold. It is a right inherent in and dependent upon the right of property, and incapable of being seized and sold separate from the property itself. Until Field was divested of the property itself, his right as owner to maintain and protect his possession and prevent depredation could not be sold. The case would not have been different had Field's suit been for an injunction to prevent Weaver from unlawfully tearing down a wall upon his property. Could Weaver, as a creditor, seize and sell such a right, and, as purchaser, acquire the right to tear down the wall? The right of property includes many incidental rights, inseparable from ownership,
150 and incapable of being seized or sold separately from the property, and this is one of them. The objection to questioning a judicial sale collaterally has no application here. A sale of what, in its nature, cannot be sold is such an absolute nullity that it can have no effect whatever, and does not require to be annulled.

The only claim of Field in the suit which could be sold was his claim for damages, and that was the only thing that Weaver acquired under the adjudication.

It is further properly objected that the court committed error in entering judgment dismissing the suit on the *ex parte* motion of Weaver without notice to Field. The latter's suit could not be dismissed without his consent, express or implied, except by judgment

rendered contradictorily with him, however clear, apparently, might be the title of Weaver to claim such dismissal. It is said that if Weaver had presented a written transfer, signed by Field, of all his right as plaintiff in the suit, on proving the signature, notice
151 to Field would have been unnecessary. This may be true, but only because Field's consent to Weaver's doing as he pleased with the suit would be implied from his voluntary transfer. Although the sheriff's sale is entitled to the same effect as the voluntary sale, so far as transfer of title is concerned, it does not include the same implication of waiver of notice. The court had no more right to enter judgment declaring the rights of plaintiff in the suit extinguished by confusion, as the result of Weaver's purchase, without notice to Field, than it would have had to declare the notes in possession of Weaver extinguished in like manner on the mere presentation of Field's petition without notice to Weaver.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the cause be remanded to be proceeded with according to law, appellee to pay costs of this appeal.

The chief justice recuses himself, having been of counsel in the case.

152 *Testimony of Spencer Field, Referred to in Defendants' Note of Evidence. Filed May 1st,* 1883.

SPENCER FIELD, being first duly sworn for defendants, deposes and says:

Direct examination by Mr. MARR:

Q. You are one of the defendants in this case, are you?

A. I am.

Q. Have you any recollection of the three notes, promissory notes, which are described in the bill filed against you and your sons in this case?

A. I have a distinct recollection of all the particulars.

Q. Will you state what consideration J. B. Williams, the mortgagee, gave you for the notes and the mortgage by which they were secured?

A. Gave me no consideration.

Q. For what purpose were those notes and the mortgage made?

A. They were made for my own convenience to borrow money from time to time as occasion might require.

Q. After the mortgage was signed and the notes were signed, what became of the notes?

A. I took them into my own possession.

153 Q. State whether or not these notes were ever in the possession of Mr. Williams?

A. They were never in his possession; I don't think he ever saw them.

Q. After you had given that mortgage did you ever make any use of the notes in any way?

A. Yes, sir.

Q. What use did you make of the notes?

A. I first issued them to N. C. Folger for a loan of $1,000 for 60 days; at the end of 60 days I paid him sixty days' additional interest and he carried them sixty days longer, and at the expiration of that time I paid my debt to Folger and took in the notes; after that I never made any further use of them.

Q. At what date did Folger return these notes to you, as nearly as you can remember?

A. I think it was in March, 1874.

Q. What became of the notes after they were returned to you by Folger?

A. I kept them in my possession for, I think, about two months, perhaps more; I was indebted to Weaver.

Q. After Folger returned these notes to you, what did you do with them?

A. I held them in my own possession until about the first of June, 1874; I was indebted to Weaver between $600 and $700, which
154 he was pressing me to pay; I told him that I had these notes—told him the nature of them, what I had made them for, and what I had used them for, and if he would discount them I could pay him all I owed him; he said, "If you will let me take the notes I will see what I can do with them—if I don't discount them myself I think I can get them done." Two or three days after—I gave him the notes the following day—two or three days after he came to me and he said that he couldn't discount them, but, said he, "I will loan you $2,000." I told him that would answer my purpose, and I would take them for six months. We agreed on the rate of interest; I gave him the notes to either discount them or have them done—gave them to him in trust and for no other pur-
155 pose whatever; he said would after he had agreed to lend me $2,000. He said he would go to Guyol, his notary, and have a pledge drawn. Probably an hour afterwards he came back and says: Guyol says you can't pledge your own paper, but if you will substitute some other name in place of your own he thinks it would do. "Very well," says I, "I can substitute J. B. Williams, who was the acceptor of the mortgage." He said: "That will be satisfactory. I will have everything ready tomorrow morning." I didn't see Williams until the next morning. I told him that Weaver had agreed to loan me $2,000 for six months on a pledge of those mortgage notes; that I wished he would go with me to Guyol, sign the note to Weaver for $2,000, and
156 sign the act of pledge to secure the payment. He said he would do so. I went with him to Guyol's office. Weaver wasn't there, but Mr. Guyol said that Williams could sign the note and the act, and I could fix the balance with Weaver myself, so as to save us the trouble of coming back again. He signed the note and the act of pledge—didn't see Weaver at all.

Q. Williams signed the act of pledge without seeing Weaver at all?

A. Yes, sir; Guyol had made the act of pledge & the note a

couple of hours after we were there. Weaver came to me, and, says he: "I can't accept that act"—

(Mr. Grant objects to any conversation with Weaver, as he is dead.)

"for I am advised it is not worth the paper it is written on,
157 for the reason that Williams didn't own the notes, and a man can't pledge what he don't own." "Very well," said I, "bring the notes back." Then says he: "No; I am going to let the thing stand just as it is; when you pay me what you owe me I will return you the notes." He held them for over three years. Perhaps I had better state Williams' note wasn't paid at maturity; was never protested, and he was never asked to pay it. More than three years after Weaver went to Williams' residence. Williams was living then in the third district.

Q. After Weaver had held these notes, as you say, for more than three years, did Williams show you any paper in the hand-
158 writing of Weaver which Weaver wanted Williams to sign?

(Mr. Grant objects to any evidence as to conversation between Williams and Weaver.)

A. Yes, sir.

Q. When the paper was exhibited to you by Williams had it been signed by anybody?

A. No.

Q. Did you read it?

A. I did.

Q. What was the purport of it?

A. "Daniel Weaver, Esq. Dear Sir: I am unable to pay my note of $2,000 you hold against me, and I thereby authorize you to proceed against Field's notes."

Q. This was a paper, then, to be signed by Williams?

A. The paper was written by Weaver to himself, as coming from Williams, which he wanted Williams to sign.

159 Q. What did Williams do with the paper after he showed it to you?

A. He brought it to me and left it with me.

Q. Now what has become of that paper?

A. That paper I kept for two or three years; but I mislaid it, & I don't know where it is.

Q. Have you made any search for it?

A. Yes, sir; good deal.

Q. And you have not been able to find it after the search?

A. No, sir; that was the purport of the letter.

Q. Is your recollection distinct as to the contents and purport of that letter?

A. Yes, sir; very distinct.

Q. Did Williams ever sign that paper?

A. No; he never signed it. Williams, when he brought me the paper, Williams told him he wouldn't like to sign it until he showed it to his attorney.

Q. That was not in your presence?

160 A. No, sir; when Williams brought me the letter he says: "I made an appointment with Weaver at 12 o'clock to-day at somebody's store, corner Magazine & Natchez street, to give him an answer, but I will write him a note," and he sat down to my desk and wrote a note purporting as follows: "Mr. Daniel Weaver. Dear Sir: I cannot sign the paper you handed me last evening for the reason that I don't own the Field notes, and I don't own any interest in them whatever, and I don't think I have any right to authorize you to proceed against them as you request." He took that note to the place where he was to meet Weaver. Weaver wasn't there, and he left it for him.

Q. Do you know what time that act of pledge before Guyol was passed?

A. 11th June, 1874.

161 Q. Do you know whether Williams endorsed your three notes; the three mortgage notes?

A. I know he didn't endorse them, for he had never seen them.

Q. Do you know whether Williams actually delivered these three mortgage notes to Weaver?

A. No; he never saw them.

Q. At the time that this act of pledge before Guyol was passed the notes were in the hands of Weaver?

A. Either Weaver's or Guyol's; I think in the hands of Guyol, because he had made the pledge from them.

Q. And you say that those notes were placed by you in the hands of Weaver for the purpose of raising a loan for your use and accommodation?

A. Altogether, for a loan of $2,000, which he said he would make me.

Q. Did Weaver ever lend you any money on those notes?

162 A. Never a cent.

Q. Did you ever attempt to get those notes out of the possession of Weaver, in any way?

A. I brought suit against him for them, which suit is now pending.

Q. You mean that injunction suit?

A. Yes, sir; shortly after this letter Weaver filed a petition in the sixth district court, averring that he was the holder and sole owner of these three notes, and took out a writ of seizure and sale, and advertised the property. I enjoined the sale on the ground of fraud without giving bond; his attorney, which was Judge Bermudez, took an exception.

(Mr. Grant objects, on the ground that the record will show all that.)

Q. Do you know whether Nathan C. Folger is now living?

163 A. He is dead.

Q. Do you know when he died?

A. Four years ago; I think the 18th August.

Q. You mean in 1878 or '79?

A. He died in 1878.

Q. Do you think you would recognize the act of pledge that was made by Williams before Guyol if you were to look at it or have it read to you—any part of it?

A. I have seen it.

Q. Do you know of Williams having made but one act of pledge to Weaver?

A. That is all.

Q. Do you recollect the passage of that act (Document "O")?

A. Yes, sir.

Q. And you think that is the same?

A. Yes, sir.

(Mr. Marr offers in evidence document marked Exhibit "O.")

Q. Is there any other matter touching this controversy
164 about which you have not been already interrogated which will tend to show what is the truth and reality of the defences set up by you to these three mortgage notes?

A. I don't think of any.

Cross-examination by Mr. GRANT:

Q. On what account was this $700 which you owed Mr. Weaver on the 11th June, '74?

A. Mr. Weaver went on an appeal bond for me and had to pay, with the exception of $200, which I gave him.

Q. So you owed him about $700 on that account?

A. Yes; I don't think it is for so much as that. I think the amount due from me was more than that, but after giving him $200 it reduced it.

Q. Do you know what case that was in?

165 A. I- was in the case of Alfred Marchand against Spencer Field.

Q. You have not paid that money to Mr. Weaver, have you?

A. No; I have not paid it.

Q. Don't you owe also a large amount which is a judgment against you; hasn't Mr. Weaver got a large judgment against you?

A. Yes, but that is of recent date; I had been doing business with Weaver's brother for a good many years; when he died he held a note of mine of $4,500 against me, and Daniel Weaver was his universal legatee and it fell to him, and after he came in possession of his brother's effects I settled with him—that is, made a note direct to Weaver and secured it by the transfer of fifteen thousand dollars' stock in the Ocean Dry Dock Co.; the Ocean Dry Dock Co. sub-
166 sequently failed and he lost his stock, & then he brought suit on that note.

Q. And recovered judgment?

A. Yes, sir; I made no defence; I had no defence to make.

Q. Why did you pay interest to Mr. Weaver on the note of $2,000 on January 14th, 1875?

A. I have never paid him.

Q. Why did you pay interest afterwards for 1875, '76, & '77 on a loan for $2,000?

A. I never paid him any interest on the Williams loan; I never paid any interest on the Williams note.

Q. What did you pay that on?

A. On the $4,500.

Q. Have you got any receipts for the interest you paid?

167 A. I guess it is endorsed on the note; I don't know.

Q. Are you certain these endorsements are on that note of $4,500?

A. I think the endorsements is on that note for $4,500, up to the 1st of January, 1877.

Q. You were paying eight per cent. interest on that note, were you not?

A. I think so; it was not less than that, because I had been paying him 12 per cent., but all the money I ever paid him was for interest on the $4,500 note.

Q. You say these notes were extinguished—these three notes?

A. Yes, sir.

Q. Why did you have your son, who purchased this property covered by the mortgage, assume their payment, if they were extinguished?

168 A. It was not that I expected him to pay the notes as long as I held them.

Q. You never expected him to pay them?

A. I never expected him to pay them for I held the notes myself.

Redirect examination by Mr. MARR:

Q. At what time did Daniel Weaver's brother, whom you have mentioned, die?

A. Well, I can't fix the date.

Q. At the time of his death he held your note for $4,500?

A. Yes, sir.

Q. After he died you gave Daniel Weaver a note for the amount due on that $4,500 note, did you?

A. Yes, sir; for the $4,500 note, and transferred 160 shares of the Ocean Dry Dock Co.'s stock.

Q. As security for the new note?

A. Yes, sir.

169 Q. At what time did Daniel Weaver pay the amount of his bond as security for you in the Marchand case?

A. Well, I think it was early in 1874, before this pledge was made.

Q. You can't recollect the date of Daniel Weaver's brother's death?

A. No, sir; the succession was opened by Randell Hunt.

Q. You say the interest which was paid by you to Daniel Weaver was paid upon the $4,500 note?

A. Yes, sir.

Q. Have you any recollection of having paid any interest on the new note you gave to Daniel Weaver in the place of the $4,500 note?

A. Yes, sir; I paid him interest several times.

Q. You made him no payment on account of the principal or interest on the $2,000 Williams note?

A. No, sir; never.

Signature waived.

170 EXHIBIT "O."

Offered in evidence by Mr. Marr, and referred to in the foregoing testimony.

"O." N. P. & S. T. T. Ap'l 9th, 1883.

Pledge. J. B. Williams to D. Weaver. 11 *June,* 1874.

Be it known that on this eleventh day of the month of June, in the year of our Lord one thousand eight hundred and seventy-four, before me, Theodore Guyol, notary public, duly commissioned & sworn, for the parish of Orleans, State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned, personally appeare- James B. Williams, of this city, who declared and acknowledged that he is justly and truly indebted to Daniel Weaver, also of this city, in the full sum of two thousand dollars, for which he has given and furnished his promissory note, drawn to the order and endorsed by himself, dated this day & made payable six
171 months after date, with interest from and after maturity until paid, at the rate of eight per cent. per annum, which note, after being countersigned and paraphed by me, notary, to identify it with this act, was delivered to the said Weaver, who acknowledges the receipt thereof.

And in case it should become necessary to institute legal proceeding for the recovery of the amount of the said note, or of any part thereof, the said Williams binds himself to pay the fees of the attorney-at-law who may be employed for that purpose, which fees are hereby fixed at five per cent. on the amount sued for. Now, in order to secure the full and punctual payment of the said note, together with all eventual interest, cost, charges, and att'y fees thereon
172 as aforesaid, the said James B. Williams does hereby pledge, pawn, assign, transfer, and deliver unto the said Daniel Weaver, who acknowledges the receipt thereof, three certain promissory notes, all drawn and endorsed by Spencer Field, and also endorsed by the said Williams, dated on the first day of November last (1873), bearing interest at the rate of eight per cent. per annum from maturity until paid; secondly, mortgage by act passed before W. J. Castell, notary, in this city, on the first day of November, 1873, and made payable as follows: One for two thousand dollars in one year, one for fifteen hundred dollars in two years, and the other for a like sum of fifteen hundred dollars in three years.

173 It is agreed that in case of non-payment of the said note of two thousand dollars at maturity, the said Daniel Weaver shall have the right, & he is hereby authorized & empowered, to sell and dispose of the three notes above inscribed and given in pledge, either by public or private sale, as he shall think proper, & to apply

the proceeds of such sale to the payment of said note of two thousand dollars in capital, interest, & costs, and the balance, if any there be, to be paid over by the said Weaver to the said Williams.

Done and passed in my office, at the city of New Orleans, on the day and date aforesaid, in the presence of A. Guyol and John
174 Steiner, competent witnesses, who have signed with the parties & notary after reading the whole.

(Signed) DANIEL WEAVER.
J. B. WILLIAMS.

ARMAND GUYOL.
JOHN STEINER.

THEO. GUYOL,
Not. Pub.

A true copy from the original.
[SEAL.]

THEO. GUYOL,
Not. Pub.

Testimony of J. B. Williams, Referred to in Defendants' note of Evidence. Filed May 1st, 1883.

J. B. WILLIAMS, being first duly sworn on behalf of defendants, says:

Direct examination by Mr. MARR:

Q. Are you the person who is the mortgagee in the mortgage given by Spencer Field before Castell, notary, in 1873?

A. I am.

Q. What interest had you in those notes and the mortgage, Mr. Williams?

A. None at all.

175 Q. Did you ever give anything to Spencer Field for the notes and the mortgage?

A. No, sir.

Q. Have you any knowledge of the purpose for which that mortgage was made and the notes?

A. Well, I don't remember. The explanation was made, but I presume it was to raise money.

Q. Raise money for whom?

A. Well, we were in business together at that time. He said it was easier to raise money on mortgage notes than it would be on the dock's notes. I think that was the explanation at the time.

Q. When you signed the act and the notes were signed, to whom were the notes delivered?

A. Well, that I don't remember. I know the notes were never in my possession; that I remember. I signed the act and ac-
176 cepted the mortgage.

Q. How many times have you seen those notes since that act was passed?

A. I never seen them. I didn't see them ever at Guyol's office.

Q. Having you any recollection of having made an act of pledge of these notes, these mortgage notes, to Daniel Weaver before Guyol?

A. Yes, sir.

Q. Here is a paper (Document "O"), which purports to be a notarial copy of the act of pledge, 11th June, 1874, made by you of these three promissory notes, mortgage notes, to Daniel Weaver, as security for your note of $2,000 at six months. Do you recollect whether that was the object and purpose of that act?

A. That was the purpose of that act.

177 Q. Did you ever make any other act of pledge before Guyol of these notes?

A. No, sir.

Q. Did you ever make any act of pledge before any other notary of these notes?

A. No, sir.

Q. At the time you made this act of pledge, where were the three mortgage notes?

A. I don't know.

Q. Were they in your possession?

A. No, sir.

Q. Do you remember whether you ever endorsed those notes or not?

A. I don't. I don't think I did.

Q. Do you know who delivered the notes to Daniel Weaver—did you deliver them to him?

A. No, sir.

Q. This act recites that you gave this note for $2,000 at six months; what did Weaver give you for that note?

178 A. No consideration whatever.

Q. What consideration did anybody give you for that note?

A. Not one cent.

Q. What did you do with the note after you signed it?

A. I left it, I think, there; I never had possession of it. Mr. Weaver wasn't present, and it was left with Mr. Guyol, I think.

Q. Weaver wasn't present when you signed the act?

A. No, sir.

Q. Was any explanation made to you by anybody of the object of making that pledge?

A. No, sir.

Q. What became of that $2,000 note?

A. I don't know.

Q. Have you seen it from that day till this?

179 A. No, sir; its payment was never demanded of me.

Q. Did Weaver or any other person ever make any demand on you for the payment of that note?

A. No; the only demand—it was not a demand but Weaver wrote, or he visited my house in the third district, and then wrote a note for me to sign, confessing that I was unable to pay the note & authorizing, or asking me to authorize him, to proceed against Field.

Q. Well, did you sign that paper?

A. I did not.

Q. What did you do with it?

A. Well, I took it to Mr. Egan, who was our attorney then. I

didn't see Mr. Weaver the next morning, but wrote him a note, stating that, having no interest in the matter, I couldn't authorize him to proceed against anybody. I left the note at the
180 corner of Magazine & Natchez street-, where he was to meet me.

Q. Then you didn't sign the paper which Daniel Weaver had written to be signed by you?

A. No, sir.

Q. What did you do with that paper?

A. I don't remember what I done with it; I think I gave it to Mr. Field.

Cross-examination by Mr. GRANT:

Q. You made that act of pledge at the request of Mr. Field, did you not?

A. Yes, sir.

Q. You were not to receive anything yourself?

A. No, sir; not a dime one way or another.

Q. Is that all you know about the transaction, what you have stated here?

A. That is all I know about it.

Q. You don't know anything about what took place between Mr. Field & Mr. Weaver?

181 A. No, sir.

Q. You simply know that at Mr. Field's request you made this act of pledge to Weaver and gave the note?

A. Yes, sir; just the same as I accepted the mortgage; Field gave me some reason at the time, that it was a matter of no interest to me; didn't think it would ever go to law or anything of that kind.

Q. Did you ever have any conversation with Mr. Weaver?

A. None whatever; only that day when he came there to request me to give him authority, if I couldn't pay the note, to proceed against Field's notes.

Q. He claimed, then, that the amount was due from Mr. Field?

A. I understood so.

182 Q. Do you remember about what date this was?

A. In 1874; I don't remember the date; it was a good while ago; having no interest in it, I didn't try to recollect.

By Mr. MARR:

Q. Have you any recollection of having seen the $2,000 note since you signed it?

A. No, sir.

Q. You don't know now where it is?

A. I don't know; no, sir.

Q. But you do know that nothing was ever given to you for that note?

A. I do know that I never received a cent's consideration; not one cent.

Q. And you never gave Field anything for these mortgage notes?

A. No, sir.

Signature waived.

Decree Dismissing Bill. Entered and Filed January 12th, '84.

UNITED STATES OF AMERICA:

183 Circuit Court Fifth Circuit, Eastern District of Louisiana.

HEIRS OF DANIEL WEAVER *vs.* SPENCER FIELD *et al.*

Thise cause came on to be heard on bill, supplemental bill answer, replication, and evidence, and was argued; whereupon the court, considering that, by the undisputed evidence of Spencer Field, corroborated by witness Williams and the circumstances of the case, it is shown that the notes in suit, after being issued and delivered to one N. C. Folger, were taken up by and came into the possession and ownership of the maker, and were thus, under the laws of Louisiana, extinguished by confusion, and of all which said Weaver had notice, and considering that by the extinguishment of
184 the notes the mortgage fell, it is ordered, adjudged, and decreed that there be judgment for the defendants, dismissing complainant's bill with costs.

Decree rendered Jan'y 12th, 1884, and signed same day.

(Signed) DON A. PARDEE, *Judge.*

Order Rehearing Refused. Extract from the Minutes, November Term, 1883.

NEW ORLEANS, MONDAY, *Feb'y 11th,* 1884.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

DANIEL WEAVER *vs.* SPENCER FIELD *et al.* } No. 9366.

Upon due consideration of the complainant's application for a rehearing, it is ordered by the court that a rehearing be, and hereby is, refused.

M. & O. for Appeal. Entered and Filed 26 June, 1884.

185 In U. S. Circuit Court, E. Dist. La.

DANIEL WEAVER *vs.* SPENCER FIELD *et al.* } No. 9366.

On motion of Rouse & Grant, solicitors for John V. Weaver, Arthur C. Weaver, Emily C. Weaver, Helen A. Weaver, Ella F. Weaver, wife of George M. Lewis, heirs of Daniel Weaver, complainants in this cause, suggesting that there is error to their prejudice in the final decree made by said circuit court in said cause the 12th day of January, 1884, and that they desire to appeal therefrom, it is

ordered that said complainants be, and they are hereby, granted an appeal from said decree to the Supreme Court of the United States, returnable thereto on the first day of its next term, upon their giving bond for costs in the sum of $250, with surety.

186 (Endorsed): Service accepted and citation waived. (Signed) R. H. Marr, sol. for defendants. N. O., 3 Sept., '84.

Bond for Appeal. Filed 2d September, 1884.

UNITED STATES OF AMERICA:

Know all men by these presents that we, John V. Weaver, Arthur C. Weaver, Emily C. Weaver, Helen A. Weaver, and Ella F. Weaver, wife of George M. Lewis, as principals, and John D. Rouse as surety, are held and firmly bound, jointly and severally, unto Spencer Field, Senior, Spencer Field, Jr., and Frederick T. Field in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said Spencer Field, Sen., Spencer
187 Field, Jr., and Frederick T. Field, their heirs, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated the twenty-fifth day of August, in the year of our Lord eighteen hundred and eighty-four.

Whereas the said principal obligors above named having heretofore, to wit, on the 26th day of June, 1884, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 12th day of January, 1884, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of Daniel Weaver
188 (revived in the name of John V. Weaver, Arthur C. Weaver, Emily C. Weaver, Helen A. Weaver, and Ella F. Weaver, wife of George M. Lewis) *vs.* Spencer Field, Sen., Spencer Field, Jr., and Frederick T. Field, No. 9366 of the docket thereof:

Now the condition of the above obligation is, that if the above-bounden John V. Weaver, Arthur C. Weaver, Emily C. Weaver, Helen A. Weaver, and Ella F. Weaver, wife of Geo. M. Lewis, shall prosecute their said appeal to effect, and shall answer all costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) JOHN V. WEAVER. [L. S.]
" ARTHUR C. WEAVER. [L. S.]
" EMILY C. WEAVER. [L. S.]
" HELEN A. WEAVER. [L. S.]
" ELLA F. WEAVER. [L. S.]
By ROUSE & GRANT,
Their Solicitors.

Signed, sealed, and delivered in the presence of—
(Signed) T. M. C. HYMAN.
" R. B. HOLLY.

Bond accepted.
(Signed) J. D. ROUSE. [L. S.]
(Signed) DON A. PARDEE,
Circuit Judge.

189 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 188 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Daniel Weaver *v.* Spencer Field *et als.*, No. 9366 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 8th day of Sept'r, A. D. 1884.

[SEAL.] E. R. HUNT, *Clerk.*

I, Don A. Pardee, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans in said district, this 8th day of September, A. D. 1884.

DON A. PARDEE, *Judge.*

Endorsed on cover: E. Louisiana C. C. U. S. No. 936. John V. Weaver, Arthur C. Weaver, Emily C. Weaver, Helen A. Weaver, and Ella F. Weaver, wife of George M. Lewis, appellants, *vs.* Spencer Field, Senior, Spencer Field, Junior, and Frederick T. Field. Filed 15 September, 1884.

114244

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 936.

JOHN V. WEAVER ET ALS., APPELLANTS,

versus

SPENCER FIELD ET ALS., APPELLEES.

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 936.

JOHN V. WEAVER ET ALS., APPELLANTS,

versus

SPENCER FIELD ET ALS., APPELLEES.

STATEMENT.

On the 1st day of November, 1873, Spencer Field, one of the defendants, executed an act of mortgage bearing upon property which he owned in the city of New Orleans, for the purpose of securing his three several promissory notes in the aggregate sum of $5000, payable each, respectively, at one, two and three years.

The notes were made to his own order, endorsed in blank, and the mortgage was executed in favor of James B. Williams.

Subsequently, on the 6th day of June, 1874, Spencer Field transferred the property to his son, Spencer Field, Jr., who afterwards, on the 31st day of March, 1875, conveyed to his brother, Frederick T. Field. Both of these purchasers assumed the mortgage executed by their father, and agreed to pay the amount of said notes to the holder thereof, out of the price of the sale, which they retained in their hands for that purpose.

We have no means of knowing when the notes came into the possession of Daniel Weaver, from whom plaintiffs inherited

them, but the defendants say, that it was on or about June 11, 1874, which we may accept as the true date.

On the 5th day of February, 1878, Daniel Weaver sued out what is known as executory process against Spencer Field, in the late Sixth District Court for the parish of Orleans, upon the notes and mortgage.

But Field filed a petition in the same court, alleging that Weaver claimed title to the notes through a certain act of pledge made by J. B. Williams to secure his note for $2000. That the said notes were in the possession of the said Daniel Weaver, on deposit as the property of petitioner, and that Williams had no right to pledge them; and he further alleged, that the debt and the mortgage had become extinguished by confusion.

An injunction *pendente lite* was granted, but before the cause was put at issue, the Sixth District Court was abolished by the new Constitution of the State, adopted in 1879.

Daniel Weaver then filed a bill against Spencer Field and his two sons, who had assumed the notes and mortgage, to foreclose the mortgage in the United States Circuit Court, for the Eastern District of Louisiana, requiring defendants to answer, *but not under oath*

The defendants first pleaded the pendency of the foregoing proceeding in the State court, in bar, but the plea was held to be insufficient, upon argument.

Shortly afterwards, Daniel Weaver died, and the suit was revived by his heirs. The defendants then jointly answered, reiterating the matter of the plea with greater particularity, especially averring that the sheriff of Orleans Parish had recorded a seizure against the property in the mortgage office, under Weaver's executory process, and notified the tenants of the property to pay him the rents, but *not* alleging that the sheriff was in possession of the property.

They further alleged that Daniel Weaver never was the owner of the notes; that the notes and mortgage were originally made in favor of J. B. Williams for the sole purpose

of enabling Spencer Field to raise money on them for his own purposes; that the notes remained in his possession until issued to one N. C. Folger as a security for a loan; that when the loan was paid the notes were returned to him and continued in his possession until delivered to Daniel Weaver on the 8th of June, 1874, to be used to raise money for the said Field; that said Weaver caused the said Williams to pledge them to him to secure a note for $2000; that Williams had no power to pledge them, because they were not in his possession at the time, and because they belonged to him, the said Field, who had not issued them to any person for value. R. p. 20.

Replication was filed to this answer. But afterwards complainants filed a supplemental bill, alleging that the suit of Daniel Weaver in the Sixth District Court, which had abated by his death, July 23, 1881, had been revived by them on the 3d of December, 1882, and that the alleged seizures set up as a bar by defendants had been discharged, and averring that the pretended possession of the sheriff had been ousted by the defendants, who were in undisputed possession of the property when the bill in this case was filed. The defendant's demurrer thereto was overruled. They thereupon answered, admitting the facts alleged in the supplemental bill, but disputed the law resulting from the facts. Replication was filed, and the case tried on its merits, and a decree was rendered against complainants, and they have appealed.

See Original Bill, R. p. 1 to 15; Plea to same, R. p. 15; Bill of Revivor, R. p. 17; Answer to Bill, R. p. 20; Supplemental Bill, R. p. 26; Answer to Supplemental Bill, R. p. 29; Decree, R. p. 57.

THE EVIDENCE

for the complainants consists of the three notes and the act of mortgage executed by Spencer Field in favor of James B. Williams. R. p. 433.

The act of sale, Spencer Field to Spencer Field, Jr., in which the latter assumes the mortgage. R. p. 8.

The act of sale, Spencer Field, Jr., to Frederick T. Field, in which the latter assumes the mortgage. R. p. 11.

The defendants' consists of:

1. Notice to recorder of mortgages of seizure under executory process, issued by the Sixth District Court in Weaver vs. Field. R. p. 34.

2. The return of the sheriff upon the writ of seizure. R. p. 34–5.

3. Notice of seizure. R. p. 36.

4. Petition of Field for injunction, and judgment of Supreme Court of Louisiana, and defendants' exception thereto. R. pp. 39, 40.

5. Seizure and sale of Field's interest in the suit for injunction, and opinion of Supreme Court. R. pp. 44, 45.

6. Evidence of J. B. Williams, R. p. 54, not material.

7. Evidence of Spencer Field. R. p. 47.

Referring to the notes in dispute, Field says, in substance, that they were first issued to N. C. Folger, in March, 1874, to secure a loan of $1000; and that when the loan was paid they were returned to him; that he was indebted to Daniel Weaver in the sum of $700, and that he told him the history of the notes, saying that if he would discount them he, Field, would pay him what he owed. To which proposal Weaver replied that he would see what he could do with them; that if he did not discount them himself, he thought he could get them done; that witness thereupon gave Weaver the notes, and that two or three days afterwards Weaver told him: "I will loan you $2000;" that witness replied: "That will answer my purpose." The rate of interest was agreed upon, and witness says: "I gave him the notes to discount, or have them done—gave them in trust."

Weaver said he would go to Guyol, a notary, and have a pledge made. An hour afterwards he returned, told witness he could not pledge his own notes. It was then agreed that Williams, the original mortgagee, should pledge them to secure

a note which he would give. Witness says that the pledge was made in the form proposed; but that Weaver came back again and said, "I can't accept, because Williams does not own the notes, and he cannot pledge what he don't own." Witness said, "Very well, bring back the notes," but Weaver said, "No, I am going to let the thing stand just as it is." Witness made no reply to this, but says that Weaver held the notes, to which he does not appear to have objected, until the suit was brought to enforce the mortgage. Witness introduced and offered a copy of the act of pledge, marked O, R. p. 53, as part of his evidence. On cross-examination, the witness admitted that in addition to the $700 referred to above, he owed Daniel Weaver $4500 on another note. He denies that he had paid interest for 1875, 1876 and 1877 on the $2000 note; but admitted that he had paid interest for those years on the one for $4500. Being asked to explain why he required his son, to whom he had transferred the mortgaged property, to assume the payment of the three notes in dispute, out of the price of the sale, he answered that he never expected him to pay them while he held them himself.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the notes sued on and the mortgage were extinguished by confusion.

2. The court erred in not giving a decree against Spencer Field, Jr., and Frederick T. Field, on their assumption, with recognition of the mortgage and vendor's lien resulting therefrom.

3. The court erred in not giving a decree in favor of complainants, as prayed, and in dismissing their bill.

ARGUMENT.

I.

The plea of the defendants setting up the pendency of the proceedings in the State courts, in bar, is defective and was properly held to be insufficient on argument. It is the joint

plea of all these defendants, though but one of them was a party to the proceedings in the State court. There is no averment that the case in the State court was pending when the bill in this case was filed, or was then at issue, as to the matters set up in the bill. Nor is it averred that the sheriff was in possession of the property when the bill was filed, nor that he had previously seized it. The facts intended to be alleged would be matter of abatement, and not in bar, even if properly pleaded.

And if defendants had well pleaded the pendency of the suits in the State court, their plea is clearly bad, according to all authorities. White vs. Whitman, 1 Curtis, 495; Hyde vs. Stone, 20 H. 170; Stanton vs. Embry, 93 U. S. 548; Insurance Co. vs. Brune, 96 U. S. 588.

The second plea, setting up the same matter in abatement, was filed without leave of court. Moreover, it is embraced in defendants' answer to the merits, and was thereby waived. Bell vs. Rail Road Co., 4 W. 598; United States vs. Boyd, 5 H. 29; Townsend vs. Jamison, 7 H. 706; 13 Ib. 212; 14 Ib. 505; 20 Ib. 264.

II.

The substantial questions are whether the mortgage became extinguished by confusion when the notes came back into the hands of Field, and whether the notes are secured by a new mortgage resulting from the assumption of them by the other two defendants when they purchased the property.

The right of a person to mortgage his property in favor of a merely nominal mortgagee to facilitate the raising of loans, when the rights of other creditors are not affected, has never, as we are aware, been disputed. Field executed the mortgage in question to enable him to obtain loans on them from time to time as collateral security. He used them for this purpose with Folger, and upon payment of the loan took them back, but did not cancel them.

In fact, the notes were never paid, though the loan to which they were collateral was discharged, according to the testi-

mony of Field. They were again issued to Weaver before maturity.

The circuit judge was of the opinion that, though the notes thus reissued were valid obligations, the mortgage had been extinguished, and his decision was evidently based upon the rule of the Supreme Court of Louisiana, laid down in the case of Doll vs. Rizotti, 20 A. 263.

But this case has been distinctly overruled, and is no longer authority.

In Schepp vs. Smith, 35 A. p. 1, the court, after reviewing the previous cases, says: "Whatever perplexities once existed touching the power of a mortgagor to dispose, himself, of his notes secured by mortgage in favor of a nominal mortgagee, have been effectually dispelled by the ruling in the case of the Merchants' Insurance Company vs. Jamison, 25 A. 363; succession of Dolhond, 21 A. 3, and Gardner vs. Maxwell, 27 A. 561. These two last cases theoretically favor the recognition of the validity of the mortgage in favor of third innocent holders, where the note is issued before maturity."

The same doctrine is reiterated in Roberts vs. Beauer, 35 A. 453.

In all these cases where the right of a mortgagor to issue notes which he himself holds has been drawn in question, the contest arose between creditors of the mortgagor claiming priorities, and not between the latter and the holder of the note so issued.

The maker of a note cannot be heard to say that it is void, merely because it has been reissued. It may be that the note will take a new date, as of its reissue, and the mortgage also; but the debtor is estopped by his conduct from denying their validity, though a creditor may not be. But we are not compelled to rely on the original mortgage to Williams.

Spencer Field sold the property to his son, Spencer Fied, Jr., on the 6th of June, 1874, for the price of $5100. Of this sum the purchaser is declared, in the act, to have paid $1000 in cash. The balance he retained in his hands, and undertook

to apply it to the payment of the notes now in suit, assuming the mortgage obligations by which they were secured.

On the 31st of March, 1875, a year after the notes were acquired by Weaver, Spencer Field, Jr., sold to his brother, Frederick T. Field, who in turn made a like assumption. See exhibits B and C R. p. 8, 11.

We have claimed the benefit of these assumptions, which, in themselves, create new and independent mortages.

In such cases it is a matter of indifference, says the court in Conte vs. Cain, 33 A. 966, whether there was any valid mortgage in existence or not. Where a purchaser assumes the payment of a debt due by the vendor, out of the price which he retains in his hands, it is an independent act, whereby the debt becomes secured by the vendor's lien. The vendor's privilege springs from the mere fact that the price remains unpaid, without any stipulation granting it in terms. And this privilege extends, not only to such portions of the price as may be due the vendor, but also to all other portions represented by others, and which form part of the consideration.

This doctrine is not new to the jurisprudence of the State, but has been uniformly followed in previous cases, as will be seen by the cases cited by the learned court *supra*.

Complainants were, therefore, clearly entitled to a decree against Spencer Field, Jr., and Frederick T. Field, on their assumption of the debt, with a recognition of mortgage and privilege resulting therefrom, even if the original mortgage to Williams had been extinguished; and these two defendants are estopped by their covenants from denying their liability.

III.

The only question remaining is, whether the complainants, as heirs of Daniel Weaver, have title to the notes sued on. The suit was revived in their names, as heirs, without objection, so that the real issue is to be determined upon the evidence relating to the transaction between Weaver and Field.

Field, in his testimony, admits that he was indebted to

Weaver in the aggregate sum of $5200, and that he authorized J. B. Williams to pledge the notes sued on to secure the note of the latter for $2000, to enable him to raise money.

He also admits that he delivered the notes to Weaver, with the understanding that he should make the loan himself, or have it done, to use his own language. But he denies that Weaver did either, and says that Weaver told him a few days after the date of the pledge, that Williams could not make a pledge, as he was not the owner of the notes. Field says that he then asked Weaver to return the notes, but that he replied, "no, I am going to let the thing stand just as it is." Field made no reply to this, and by his silence acquiesced in the proposal. He made no effort to disturb Weaver's possession of the notes, until the latter brought suit on them on the fifth day of November, 1878, a period of nearly four years. Moreover, by his own confession, he paid interest on the $4500 note, for 1875, 1876 and 1877. Thus, by his own showing, his conduct, after the transaction took place, has not been consistent with the theory that Weaver wrongfully retained possession of the notes, which he seeks to establish by his evidence.

And the defences set up in his pleadings do not correspond with his evidence.

Thus in the petition filed in the Sixth District Court, in which he sought to enjoin the sale under executory process, in February, 1878 (Record, page 40), he alleges that the notes were obtained from him by fraud and misrepresentation, but does not set out the fraudulent acts; that Weaver never was the owner of the notes, because Williams had no authority to pledge them, they not being in his possession at the time, and that the mortgage was extinguished by the petitioner having become the owner of them after they were executed.

In his answer to the bill, R. p. 20, he avers that Weaver never was the owner of the notes, *bona fide*, and for value; but that he placed them in his hands to raise money upon for his, Field's, use; that Weaver caused Williams to pledge them to him to secure a note for $2000, but that Williams, not being the

owner or in possession of the notes, had no power to make the pledge, and that the notes having come back into his, Field's, hands, after their first issue, the mortgage became utterly extinguished by confusion. But there is no averment that Weaver failed to have the notes discounted, and the charge of fraud contained in the petition is not made.

When we come to his evidence, he admits that Weaver obtained possession of the notes in a lawful manner, and that Williams had authority to pledge them; but denies that he received any consideration for the transfer. But he does not say that Weaver wrongfully retained them. On the contrary, he appears to have consented to the detention by his silence and subsequent conduct.

In the State court he alleged that Weaver obtained the notes by fraud; in the Circuit Court, that Weaver was not the owner for value. In his evidence he admits that he delivered the notes to Weaver, who agreed to advance $2000 on them as a loan, but that he failed to do so.

But inasmuch as the answer does not aver this alleged failure of consideration, his evidence, even if entitled to be lief cannot be considered under the long-established rule that a fact proved but not averred can no more avail a party than a fact alleged but not proved.

Considering Field's confessed silence when Weaver told him that he would keep the notes; that he actually owed Weaver more than $5000; that he paid interest, as he admits, upon the greater part of the debt for three years, and made no objection to the retention of the notes until an attempt was made to collect them nearly four years after the original transaction took place; that the sworn allegations contained in his petition for injunction and his answer in this case, denying the authority of Williams to pledge the notes, were untrue, as he now confesses in his testimony; that the defence set up in his evidence was not disclosed in said petition and answer, and that in his pleadings he depended upon the want of authority in Williams to pledge the notes, and the extinguish-

ment of the mortgage, as a defence, and not upon a failure of consideration for the transfer, and that the defence rests upon the evidence of alleged conversations between the defendant, Fields, Sr., and the ancestor of the complainants, whose mouth is closed by death, we submit that complainants' title to the notes has not been successfully impeached.

The evidence does not overcome the presumption arising from Field's silence when Weaver proposed to keep the notes, and from the latter's possession of them, and from the act of pledge. Whenever a proposal is addressed to a party under such circumstances as to call for answer, his silence, according to elementary writers, will be construed as an acquiescence. 1 Greenleaf on Evidence, Sect. 197–8.

The whole defence, outside of the legal question, rests upon alleged conversations and admissions of a deceased person, testified to by a party in interest. "The impossibility of contradicting a witness under such circumstances, and his entire immunity from punishment for false swearing, has always induced courts to receive such testimony with disfavor, and declare it the weakest species of evidence known to the law." Bringier vs. Gordon, 14 La. A. 274.

"It is a very weak kind of evidence, scarcely worthy of belief," says the same court in the Succession of Fox, 2 R. 299.

The mischief growing out of this kind of evidence was attempted to be provided against by sec. 858 of U. S. Revised Statutes, which excludes the testimony of a party to, or interested in, a suit by or against the personal representatives of a deceased party. But, unfortunately, complainants sue as heirs in their own interest, and do not come within the letter of the statute, though clearly within its policy.

Heirs would be at the mercy of any person who might choose to swear falsely, or even suppress part of the truth, if the conversations and statements of their deceased ancestor, made out of the presence of a third party, are to be allowed to defeat acquired titles.

In the case of Insurance Co. vs. Cook, 103 U. S. 544, which

is similar to the one at bar, the court refused to sustain the defense, though facts were sworn to in the answer and testified to at the trial, which would have been decisive if the court had given credit to the witness. The defendant had the advantage in that case of a sworn answer responsive to the bill, which is ordinarily conclusive unless disproved by the evidence of two witnesses. Spencer Field has not this advantage, for his oath and that of all the defendants, was waived.

IV.

We submit that complainants should have a decree against Spencer Field, Jr., and Frederick T. Field on their assumption for the full amount of the notes, with recognition of the mortgage and vendor's lien resulting therefrom, in accordance with the established jurisprudence of the State of Louisiana, and that amount awarded be applied to the payment of the whole debt due by Field, to wit: the $4500 and the $700, which he admits he owes.

But if the court should be of the opinion that complainants should be considered as creditors of Spencer Field only to the amount of $2000 secured by the pledge, the decree should be for the whole amount of $5000 and interest against his two sons who assumed the payment of the notes, with a direction that this $2000, together with the interest thereon, be paid to complainants, and the balance of the fund be paid to Spencer Field. And we further submit that complainants, in any view of the case, should be paid the $700 which Field admits was to have been discharged out of the proceeds of the loan.

Appellants therefore pray that the decree of the Circuit Court be reversed and set aside, and that such decree be rendered as will do justice to all parties.

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellants.

114-244

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

No. 936.

JOHN V. WEAVER AND OTHERS, APPELLANTS,

versus

SPENCER FIELD AND OTHERS, APPELLEES.

BRIEF FOR APPELLEES.

R. H. MARR,
Of Counsel for Appellees.

NEW ORLEANS, December, 1884.

A. W. Hyatt, Print, 73 Camp St, N. O—30,612

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The introductory "Statement," in the Brief of Counsel for Appellants, suffices to acquaint the Court, in a general way, with the nature of the controversy to be determined on this Appeal. Such other facts, appearing of record, as may be deemed material, will be brought to the notice of the Court in their proper connection.

There are some errors and inaccuracies in the statement, which may as well be noticed here. In the Brief, near the foot of page 2, the learned counsel, referring to the Answer of Defendants to the Original Bill, say that it does not allege "that "the Sheriff was in possession of the property." Turning to this Answer, printed Record, p. 21, it will be seen that the seizure by the Sheriff, on the 13th February, is stated with minute particularity; and, at the foot of the page, it is stated "that by means and by reason of the premises the said mortgaged "property, from the date of the seizure under the said writ, "until the present time, has remained under seizure, as it is "now, without interruption, and in the legal custody and pos-

" session of the Civil Sheriff of the Parish of Orleans, under and " in virtue of the said writ."

At page 3 of their Brief, the learned counsel, referring to the Supplemental Bill, say the Defendants answered "admitting " the facts alleged in the Supplemental Bill, but disputed the " law resulting from the facts."

The mere reading of the Answer, P. R. 29 to 31, inclusive, shows that some of the allegations of the Supplemental Bill are admitted, and some are denied.

It may not be necessary now to inquire whether the plea in bar to the Original Bill was sufficient; or whether the Court erred in overruling the Demurrer to the Supplemental Bill: because the matters set up in the plea, and all that could have been reached by the Demurrer, are amplified and stated at length in the Answers to the Original and Supplemental Bills.

The original Bill was filed 8th April, 1881. After setting out the mortgage and the notes of 1st November, 1873; the sale of the mortgaged property by Spencer Field to Spencer Field, Jr., and the assumption by the latter of the mortgage notes on the 6th June, 1874; and the sale by Spencer Field, Jr. to Frederick T. Field, and the assumption by Frederick, of the mortgage notes, on 31st March, 1875 the Bill charges:

That Daniel Weaver, the Complainant, on the 5th February, 1878, brought suit, by executory process, on the notes and mortgage, against Spencer Field, the mortgagor, in the Sixth District Court for the Parish of Orleans, and obtained the writ, and the property was advertised for sale by the Civil Sheriff of the Parish of Orleans, "by virtue of said proceedings, the same " being entitled Daniel Weaver vs. Spencer Field, and numbered " 9804 upon the docket: and afterwards the said Spencer Field " brought suit in said Court against Daniel Weaver, to enjoin " said sale under said writ of executory process, and obtained " an Injunction, *pendente lite*, suspending proceedings in said " suit No. 9804, and said injunction suit still remains undecided:

" And your orator avers that said Field is without right to " enjoin said sale, and that his proceedings are dilatory: that " said Injunction was obtained without bond, and defendants " are and have been enjoying the revenues of said property du- " ring the pendency of said proceedings, and have neglected to " pay the taxes thereon."

The Bill goes on to charge the insufficiency of the property to pay the amount due under the mortgage, including taxes and expenses; that each of the Defendants is insolvent; and that a Receiver is necessary.

The prayer is for judgment, *in solido*, against the defendants, the mortgagor and the two successive purchasers of the mortgaged property: that complainant be declared to have a first lien and privilege on the property for the amount due: that it be sold by order of the Court; and that defendants be decreed, *in solido*, to pay any deficiency in the proceeds. P. R. 1–4.

It would seem that the Chancellor, on the opening of this Bill, without further inquiry, might well have dismissed it for want of equity, and for want of jurisdiction, of power and authority to deal with the subject matter in controversy, apparent on the face of the Bill.

I.

The aid of a Court of Equity and good conscience is invoked with a very bad grace, by one of the parties litigant, who seeks, through its interposition, to evade the equitable writ of injunction, issued by another Court of competent jurisdiction, at the instance of the other party, in a suit still pending and undecided:

II.

The purchasers of the mortgaged property were not mortgagors: Exhibits B and C: The mortgage, Exhibit A, contained the pact *de non alienando*, which secured to the holder of the mortgage notes, notwithstanding any subsequent alienation, without notice to any subsequent purchaser or possessor, the right to pursue the mortgaged property, summarily, by seizure and sale,

as if it were still in the owership and possession of the mortgagor.

The assumptions by Spencer Field, Jr., and Frederick T. Field, imposed upon each of them personal liability, to the same extent as the notes imposed upon Spencer Field personal liability: a liability which must be enforced by suit at law, and judgment *in personam*, not by Bill in Equity.

III.

No Court of the United States can lawfully interfere with property which a competent State Court has, already, in a proceeding *in rem*, condemned to be sold for a special purpose: which is *in custodiam legis*, in the possession of the Executive Officer of the Court: which that officer has advertized for sale, and has failed to sell only because the Court which commanded him to seize and to sell has, in the exercise of its lawful jurisdiction and authority, arrested, by Injunction, its own previous order and judgment, and suspended further proceedings in execution of its writ and process of seizure and sale, during the pendency of the Injunction suit.

IV.

It is true, in general, that every Court has exclusive control, subject to the right of appeal, of the execution of its own process; and the textual provision of the Code of Practice, Art. 738, regulating executory process, specially requires the application for Injunction to be filed "in the Court issuing the order" of seizure and sale.

Surely it was the exclusive province of the Court in which the Injunction suit was necessarily brought, to determine, in first instance, whether the plaintiff in Injunction was entitled to that remedy; and whether the case stated required the granting of the Injunction without bond, as provided in the Code of Practice, Art. 739.

V.

The law of Louisiana requires the Sheriff, when he seizes

real estate, to seize, also, the rents and revenues which it may yield; and to retain the property in his custody and under his control until the sale. Code of Practice, Arts. 656, 657, 658.

It must be presumed that the Sheriff did his duty; but no failure or neglect on his part could authorize resort to a Federal Court of Equity, to have performed, by its own officers and appointees, the duties imposed on the Sheriff by the judgment and process of the State Court.

The Defendants, protesting that the Court was without jurisdiction, for reasons and causes apparent on the face of the Original Bill, nevertheless answered that Bill on the 6th June, 1882, P. R. 20 to 25, inclusive.

They allege that the order granting executory process, in the suit No. 9804, as in all such cases, is a judgment *in rem*. It simply condemns the mortgage property to be seized and sold in satisfaction of the mortgage debt; and the mortgage creditor would be compelled to pursue the mortgagor, in a separate suit, *in personam*, for any deficiency in the proceeds. Code of Practice, Arts. 733, 734, *et seq.*

The Answer states, with minuteness of detail, the issuing of the writ, on the 13th February, 1878: the seizure of the mortgaged property, on the same day, pursuant to the writ: the seizure of the rents, on the 14th February, in the hands of the tenants in possession: the recording of the notice of seizure in the mortgage office, and the entry in the Sheriff's "Seizure Book," the mode of retaining possession of real property under seizure prescribed by the law of Louisiana, Act of 1857, No. 189, p. 185, re-enacted in Revised Statutes of 1870, sections 3624, 3629, inclusive: the advertising of the property for sale by the Sheriff: the arrest of further proceedings by Injunction, in the suit No. 9878: the continued possession by the Sheriff, without interruption; and the retaining by him of the writ under which the seizure was made. P. R. 21, 22.

All this is shown by the notice recorded in the Mortgage Office, Exhibit 1, p. 34: the writ of seizure and sale, and the

Sheriff's return: the notice of seizure served on the defendant Field on the 14th February: certificate of recording in the Mortgage Office, and of entry in the Sheriff's "Seizure Book:" the garnishment, notices of seizure of rents in the hands of the tenants; and the petition and order of Injunction, on 13th March, 1878. See Exhibit 2, pp. 34 to 38, inclusive: Petition, etc., pp. 40, 41, 42.

The Answer, pp. 22–24, gives a condensed history of the Injunction suit, as it is set forth in the exhibits filed and in evidence: 1°: The petition and order, 40–42: 2°: The Exception and Answer of Weaver, 42: 3°: The judgment of the District Court, 3d April, 1878, that the Exception be sustained, the injunction be dissolved, and plaintiff's suit be dismissed, p. 43: 4°: Field's suspensive appeal from this judgment, 43: 5°: the decision of the Supreme Court of Louisiana, 7th April, 1879, reversing the judgment of the District Court and remanding the case, 39, 40: 6°: Sheriff's sale to Daniel Weaver, 12th January, 1880, 44: 7°. Judgment of the District Court, on *ex parte* motion of Weaver's counsel, 22d January, 1880, ordering that the Injunction be dissolved, that the writ enjoined be proceeded with, and the suit be dismissed, 44, 45: 8°: Field's appeal from this judgment, 45: 9°: Opinion and decree of the Supreme Court reversing the judgment, and remanding the case, December, 1880, pp. 45, 46, 47.

Finally, this Answer alleges that Weaver never was the owner of the mortgage notes, and that he never was the holder of them for value or in good faith: That Field made the notes and mortgage for the sole purpose of raising money for his own purposes, by sale, or discount, or otherwise: that the mortgage was made in favor of Williams and any future holder, to facilitate the use of the notes: That Field was in no manner indebted to Williams: That Williams gave no consideration for the notes: that he was merely the nominal mortgagee, without interest: that the notes were never the property of Williams, nor did he ever have them in his possession with the knowledge

or consent of Field: That from their date the notes remained in the possession of Field until he delivered them to Folger as security for a loan: That when this loan debt was paid Folger returned the notes to Field, who retained them in his possession until about the 8th June, 1874, when he deposited them with Weaver to be used, if practicable, to raise money for Field: That after the notes had so been deposited, and while they were in the possession and custody of Weaver he caused Williams, the nominal mortgagee, to pledge them to Weaver as security for the note of Williams for $2000: that Williams had no power to make such pledge, and the same was a mere nullity, for the reason that Williams did not have the notes in his possession, and they did not belong to him at the time the pledge was made: That the notes at that time belonged to Field, and were in the custody and possession of Weaver, to whom the facts with respect to the ownership and possession were known at the time the pledge was made: That Field did not, at any time, after the notes were returned to him by Folger, negotiate them, nor did he issue or deliver them to any person whomsoever for value: That by means and by reason of the premises the notes and mortgage were extinguished, and became of no effect, and that Daniel Weaver never had, nor have any persons deriving from him, any right or cause of action against respondents or any one of them, upon the notes and mortgage.

On the 9th December, 1882, six months after this Answer was filed, Complainants, Appellants, filed a Supplemental Bill, which begins with the statement that defendants, in their Answer to the Original Bill, have pleaded as a defence and in bar of the jurisdiction, the seizure by the Sheriff, under the writ of seizure and sale; and had alleged that, at the time of the filing of the Original Bill, the mortgaged property was under seizure and in the possession of the Sheriff, and that this seizure and possession had continued ever since.

This Supplemental Bill goes on to state that the suit in the State Court, Weaver vs. Field, abated by the death of Weaver,

23d July, 1881: That, on the 4th December, 1882, Complainants caused the suit to be revived in their names: that the Civil Sheriff, by their authority and direction, on the 5th December, released the property from the alleged seizure, and, on the same day, caused the inscription of seizure to be cancelled and erased; and they "now aver that the obstacle pretended by "these defendants to exist, against the exercise of the proper "jurisdiction, has been removed, if it ever existed in fact, which "is denied."

The next paragraph charges that the "pretended" possession by the Sheriff had been ousted by the defendants, or some one of them, prior to the institution of this suit: and that defendants, or some one of them, were in the unobstructed possession, use and enjoyment of the mortgaged premises, at the date of the filing of the Original Bill, and have remained so ever since. P. R. 26, 27.

Defendants demurred to this Supplemental Bill on the grounds:

FIRST. That the Court was without jurisdiction of the Original Bill at the time it was filed, and at the time the Supplemental Bill was filed, for causes apparent on the face of the Bill, and therein alleged and set forth:

SECOND. That jurisdiction depends upon the state of facts existing at the time the suit is brought; and want of jurisdiction at that time cannot be cured by anything subsequently happening, which did not exist at the time of the bringing of the suit:

THIRD. That the matters in the Supplemental Bill contained, are not sufficient in law to give the Court jurisdiction of the Original Bill, or of the causes of action in the Original and Supplemental Bills set forth and alleged—27, 28.

This demurrer having been overruled (28, 29), defendants answered, still protesting that the Court was without jurisdiction.

They denied that the suit in the Sixth District Court abated by the death of Daniel Weaver:

They allege that the return of the writ, and the cancellation and erasure of the inscription in the Mortgage Office did not impair the force and effect of the order of seizure and sale; and that an alias writ could issue at any time but for the pendency of the Injunction.

They deny that the possession by the Sheriff was pretended: and allege that it was real, and was preserved and maintained by the Inscription in the Mortgage Office: and they also allege that it was not possible for the defendants to have ousted the Sheriff, so long as he retained the writ in his hands, and the Inscription remained uncancelled in the Mortgage Office. P. R. 29, 30, 31.

The answer also alleges, p. 30, that the Original Bill, in this case, was the attempt, on the part of Daniel Weaver, and the subsequent proceedings were the attempt on the part of Complainants, to evade the Injunction suit, "contrary to Equity" and good conscience, in violation of the rights of defendants, and in contempt of the authority of the State Court, to which Daniel Weaver had resorted of his own free choice and election.

The case was heard on the pleadings and evidence, all of which is documentary except the depositions of Field and of Williams.

Field testified that Williams gave no consideration for the notes and mortgage: that they were made for his own convenience, to borrow money on, from time to time, as occasion might require: That after the mortgage was signed he kept the notes in his possession: that they were never in the possession of Williams: that he, Field, issued them to Folger for a loan of $1000, at sixty days, extended for an additional term of sixty days, at the expiration of which he paid Folger, and took in the notes, in March, 1874; and that he kept them in his possession until about the first of June, 1874: His testimony proceeds: "I "was indebted to Weaver between $600 and $700, which he was "pressing me to pay: I told him I had those notes: told him "the nature of them, what I had made them for; and if he

"would discount them I could pay him all I owed him. He "said, if you will let me take the notes I will see what I can "do with them; If I don't discount them myself I think I can "get them done. I gave him the notes the following day. "Two or three days after he came to me and said that he could "not discount them; but, said he, I will loan you $2000. I "told him that would answer my purpose, and I would take "them for six months. We agreed on the rate of interest. I "gave him the notes to either discount them or have them "done—gave them to him in trust, and for no other purpose "whatever. After he had agreed to lend me $2000, he said he "would go to Guyol, his notary, and have a pledge drawn. "Probably an hour after he came back, and says, Guyol says "you can't pledge your own paper, but if you will substitute "some other name in place of your own he thinks it will do. "Very well, says I. I can substitute J. B. Williams, who was "the acceptor of the mortgage. He said that will be satisfac- "tory; I will have everything ready to-morrow morning. I "didn't see Williams until the next morning. I told him that "Weaver had agreed to loan me $2000, for six months, on a "pledge of those mortgage notes; that I wished he would go "with me to Guyol, and sign the note to Weaver for $2000, and "the pledge to secure the payment. He said he would do so. "I went with him to Guyol's office. Weaver wasn't there; but "Mr. Guyol said that Williams could sign the note and the act "of pledge, and I could fix the balance with Weaver myself, so "as to save us the trouble of coming back again. He signed "the note and the actof pledge—didn't see Weaver at all. * * * "A couple of hours after we were there Weaver came to me "—I says, I can't accept that act, for I am advised it is not rth the paper it is written on, for the reason that Williams n't own the notes, and a man can't pledge what he don't "own. Very well, said I; bring the notes back. Then says "he, no: I am going to let the thing stand just as it is: When "you pay me what you owe me I will return you the notes." 47, 48, 49.

At page 50, Field says Weaver never lent him one cent on the notes.

Williams corroborates Field in several important particulars: He testifies that he had no interest in the notes and mortgage: that he never gave anything to Field for them: that the notes were never in his possession: that he has never seen them: that he did not know where they were at the time he signed the pledge: that Weaver gave him no consideration whatever for the note for $2000: that he signed the note and left it with Guyol: that Weaver was not present: that he has never seen the note since and does not know what has become of it; and that payment of it was never demanded of him—54-57.

No testimony was offered to contradict these witnesses; and their testimony establishes, beyond doubt or controversy, that Daniel Weaver never was the owner of the mortgage notes: that he gave no consideration, whatever, either for them or for the note of Williams: that the purpose for which the mortgage notes were delivered to him having failed, his refusal to return them to Field was in bad faith, was tortious; and that neither he, nor appellants deriving from him, ever had any right or cause of action to recover their contents.

Williams was a witness entirely without interest; and there is nothing in the Rev. Stats. of U. S., Section 858, to disqualify Field. This section relates solely to suits by and against executors, administrators and guardians. The suit is by and against persons acting and claiming for themselves, in their own names, and in their own right. Section 858 is in derogation of common right; and it cannot be enlarged or extended beyond its terms by implication.

Nelson's Case, 103 U. S. 544, is wholly inapplicable. Husband and wife joined in a mortgage of land, part of which belonged to him, part to her; and this mortgage was acknowleged before the proper officer. After the death of the husband, and of the officer, suit was brought against her and the administrator of the husband to foreclose the mortgage. She plead that her

signature to the mortgage had been obtained by violence; and that the husband and the officer who received the acknowledgment, the only other persons present, represented to her that the mortgage did not cover her land. The court held that her unsupported testimony was not sufficient to impeach the mortgage.

There are no such features in this case. The grounds upon which the nullity of the notes and mortgage is alleged in the Answer of defendants, are substantially the same as those upon which Field obtained the Injunction in the suit No. 9878. The petition for Injunction was filed on the 13th March, 1878, more than three years before the death of Daniel Weaver. It was in his power, at any time, to have compelled Field to prove, in a summary manner, before the Judge, the truth of the allegations upon which the Injunction was granted. Code of Practice, Article 741. Instead of pursuing this obvious, straightforward, most convenient and most speedy course, he chose to attack the Injunction by exception. Failing in this, by the decision of the Supreme Court, rendered in April, 1879, he resorted to the "ingenious device" of seizing, selling and purchasing, under execution, Field's right and interest in the Injunction suit: a scheme which was defeated by the decision of the Supreme Court, rendered in December, 1880. 32 An. 1242–4.

The Exception, P. R. 42, was on four grounds, of which the first and fourth related to the form of the proceeding by Field: the second to the sufficiency of the allegations of the petition to authorize the Injunction without security; and the third was that the petition disclosed no cause of action. On appeal the Supreme Court decided that the suit was properly brought; and that the allegations of the petition were sufficient, not only for the granting of the Injunction, but for dispensing with security, as provided in the Code of Practice, Art. 739. The reason assigned by the Court is: "If the averments of the Petition be "true both the notes and the mortgage are extinguished." 39, 40.

This was not a mere *dictum*. The Court, finding no defect in the form of the proceeding, was compelled to pass upon the third ground of exception, and to decide authoritatively, whether, as matter of law, the alleged causes of Injunction were sufficient. This decision was the thing adjudged between the parties and privies; and it left open the single question of fact: "are the "averments of the Petition true?"

Weaver did not choose to risk this question of fact. Having obtained a money judgment against Field, in the suit No. 10,500, of the docket of the Court in which the Injunction suit was pending, he caused execution to be issued, on the 29th December, 1879, under which the Sheriff seized, and on the 12th January, 1880, sold to Weaver, for ten dollars, "all the right, "title and interest of the defendant, Spencer Field, in and to "a certain claim, and to certain notes, and for damages fully "set forth and described in the suit of Spencer Field vs. D. "Weaver, No. 9878 of the docket * * * which suit is still "pending and undecided." See Sheriff's Act of Sale, P. R. 44.

This was followed by the *ex parte* motion and judgment of 22d January, 1880: Field's Appeal; and the decision of the Supreme Court of Louisiana. 44, 45, 46, 47.

The Supreme Court decided that Weaver did not acquire the notes by the sale of 12th January, 1880; and a judicial decision that his acts and conduct were the confession, by him, that he had not previously acquired them, would rest upon much better legal foundation, than some of the judicial decisions which have been rendered between the parties in the course of this litigation.

The attention of the Court is respectfully invited to the following propositions, and the authorities upon which they rest:

1°: Nothing occurring after the suit is brought, can confer jurisdiction, where jurisdiction did not exist at the time the suit was brought: Connolly vs. Taylor, 2 Peters, 556–565: Pechner's Case, 5 Otto, 183; Amory vs. Amory, same volume, 186.

2°: The competent tribunal which first obtains control, by

the seizure of the property proceeded against, excludes every other Court of concurrent jurisdiction: Taylor vs. Carryl, 20 Howard, 583; Freeman vs. Howe, 24 Howard, 450; Buck vs. Colbath, 3 Wallace, 340.

3°: This doctrine is not limited to cases of seizure: the Court which has proceeded to judgment will conclude the parties: and the judgment will be an effectual bar in every other court of concurrent jurisdiction. See cases last cited: Peck vs Jenness, 7 Howard, 624–5; Earl vs. Raymond, 4 McLean, 233; *Ex parte* Robinson, 6 McLean, 555.

4°: The order to seize and sell the mortgaged property is the only judgment that can be rendered in that form of proceeding. It is so far a final judgment that an appeal lies from it. Riley vs. Christie, 13 La. Annual, 256; Bronson vs. R. R. Co., and cases cited, 2 Black, U. S. 531.

5°: By the law of Louisiana a suit does not abate by the death of one of the parties; and judgments do not abate. Proceedings are suspended until the representatives of the deceased become or are made parties. Code of Practice, Articles 21, 120, 361.

6°: The precise objection that Weaver had obtained, in the State Court, a judgment ordering the seizure and sale of the mortgaged property, and that further proceedings were suspended by Injunction, in a suit which was pending at the time the Bill in the Circuit Court was filed, is not answered by the statement that the suit in the State Court abated by the death of Daniel Weaver, which occurred more than three months after the Bill was filed.

7°: By the law of Louisiana, when notes secured by mortgage have been issued by the maker, and they subsequently come into his hands, both notes and mortgage are extinguished. The maker may bind himself personally, by re-issuing the notes, but the mortgage is not thereby revived. Hill vs. Hall, 4 Robinson La. Reports, 416; Doll vs. Rizotti, 20 Annual, 265.

The cases cited in the brief of appellants, p. 7, are applicable only to innocent holders, for value, without notice. Weaver was not such a holder.

8°: The decision of the Supreme Court of Louisiana, Printed Record, 39, 40, concluded Daniel Weaver, and it concludes his heirs and successors upon the legal proposition that, "If the averments of the petition (in the Injunction suit) be "true, both the notes and the mortgage are extinguished."

Further discussion is unnecessary, because, whether the notes were or were not extinguished, they never were the property of Daniel Weaver: He gave no consideration for them. They were delivered to him for a special purpose; and that having failed, his subsequent possession of them was tortious.

Spencer Field, Jr., and Frederick T. Field were guarantors of the notes, sureties for their father. They were personally bound, and the mortgaged property in their hands was bound, to the same extent, only, as their father was bound, and as the property was bound while it remained in his ownership and possession.

The proceeding in the Circuit Court was virtually an appeal from the adverse decisions of the Supreme Court of Louisiana. The judge of the Circuit Court, who was, for many years, the judge of one of the District Courts of Louisiana, was of opinion that the notes were extinguished, under the laws of the State; and it is respectfully submitted that his decree is correct, and should be affirmed.

R. H. MARR,

Of Counsel for Appellees.

NEW ORLEANS, December, 1884.